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1949

THE

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AND

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TABLE OF CASES REPORTED
IN THIS VOLUME

A. PAGE

Alcoa Rambler, The (Alcoa S.S. Co. Inc. Owners), Oivind Lorentzen as Director of Shipping and Curator of the Royal Norwegian Government *v.* – – – – 236
Armement Anversois S/A, Tyne Improvement Commissioners v. (The Brabo) – – – 326
Attorney-General for Canada, A.-G. for Saskatchewan *v.* – 110
Attorney-General for Saskatchewan *v.* Attorney-General for Canada – – – – 110

B.

Brabo, The – – – – 326

C.

Chatterley-Whitfield Collieries Ld., Prudential Assurance Co. Ld. *v.* – – – – 512
Chenard and Co. *v.* Joachim Arissol – – – – 127
Coats, Gilmour *v.* – – – 426
Commissioner of Income Tax, Central Provinces and Berar, Nagpur, Mohanlal Hargovind of Jubbulpore *v.* – – 521

PAGE

Compagnie Financière Belge des Petroles S.A., Tank-express A/S *v.* – – – 76
Comptoir D'Achat et de Vente Du Boerenbond Belge S/A *v.* Luis de Ridder Limitada (the Julia) – – – – 293
Cottesloe (Baron) *v.* Midleton (Earl) *v.* – – – – 418
Cutler *v.* Wandsworth Stadium, Ld. – – – – – 398

D.

D. R. Fraser and Co., Ld. *v.* Minister of National Revenue 24

F.

Fraser (D. R.) and Co., Ld. *v.* Minister of National Revenue 24

G.

Galashiels Gas Co., Ld. *v.* O'Donnell or Millar – – 275
Gilmour *v.* Coats – – 426

H.

Hill *v.* William Hill (Park Lane), Ld. – – – – – 530

PAGE

I.

International Harvester Company of Canada, Ld. *v.* Provincial Tax Commission – 36
Inland Revenue Commissioners *v.* Reid's Trustees – – 361

J.

Joachim Arissol, Chenard and Co. *v.* – – – – 127
John East Iron Works, Ld., Labour Relations Board of Saskatchewan *v.* – – – 134
Julia, The – – – – 293

K.

Karlshamns Oljefabriker (A/B), Monarch S.S. Co., Ld. *v.* – 196
King, The, Noor Mohamed *v.* – 182
King, The, Tumahole Bereng *v.* 253

L.

Labour Relations Board of Saskatchewan *v.* John East Iron Works, Ld. – – – 134
London County Council, Shelley *v.* Same, Harcourt *v.* – – 56
London Passenger Transport Board *v.* Upson – – – 155
Luis de Ridder Limitada, Comptoir D'Achat et de Vente Du Boerenbond Belge (S/A. (The Julia)– – – – – 293

M.

Midleton (Earl) *v.* Cottesloe (Baron) – – – – 418
Millar, Galashiels Gas Co., Ld. *v.* 275
Minister of National Revenue, D. R. Fraser and Co. *v.* – 24
Mohanlal Hargovind of Jubbulpore *v.* Commissioner of Income Tax, Central Provinces and Berar, Nagpur – – 521

PAGE

Monarch Steamship Co. Ld. *v.* Karlshamns Oljefabriker (A/B) – – – – 196

N.

Noor Mohamed *v.* The King – 182

O.

O'Donnell or Millar, Galashiels Gas Co., Ld. *v.* – – – 275
Oivind Lorentzen as Director of Shipping and Curator of the Royal Norwegian Government *v.* The Alcoa Rambler (Alcoa Steamship Co. Inc. Owners) – – – – 236
Oliver Blais Co., Ld., Yachuk *v.* 386

P.

Peiris and Anr., Perera (M.G.) *v.* 1
Perera (M. G.) *v.* Peiris and Another – – – – 1
Provincial Tax Commission, International Harvester Company of Canada, Ld. *v.* – 36
Prudential Assurance Co., Ld. *v.* Chatterley-Whitfield Collieries, Ld. – – – – 512

R.

Reid's Trustees, Inland Revenue Commissioners *v.* – – 361

S.

Scottish Insurance Corporation, Ld. *v.* Wilsons & Clyde Coal Co., Ld. – – – – 462
Shelley *v.* London County Council. Harcourt *v.* Same – 56

T. PAGE

Tankexpress A/S *v.* Compagnie Financière Belge Des Petroles S.A. – – – – – – 76
Tumahole Bereng *v.* The King – 253
Tyne Improvement Commissioners *v.* Armement Anversois S/A (The Brabo) – – 326

U.

Upson, London Passenger Transport Board *v.* – – 155

W. PAGE

Wandsworth Stadium, Cutler *v.* 398
William Hill (Park Lane), Ld. Hill *v.* – – – – 530
Wilsons and Clyde Coal Co., Ld., Scottish Insurance Corpn, Ld. *v.* – – – – 462

Y.

Yachuk *v.* Oliver Blais Co. Ld. 386

CASES JUDICIALLY CONSIDERED

Albano, Ss. v. *Allan Line Steamship Co., Ld.* [1907] A. C. 193.
Referred to. Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government *v.* The Alcoa Rambler (Alcoa Steamship Company Inc., Owners) **J. C. 236**

Alianza Co. v. *Bell* [1904] 2 K. B. 666; [1905] 1 K. B. 184; [1906] A. C. 18.
Distinguished. Mohanlal Hargovind of Jubbulpore *v.* Commissioner of Income Tax, Central Provinces and Berar, Nagpur **J. C. 521**

Attorney-General for Alberta v. *Attorney-General for Canada* [1947] A. C. 503.
Referred to. Attorney-General for Saskatchewan *v.* Attorney-General for Canada and Others **J. C. 110**

Barton v. *Taylor* - (1886) 11 App. Cas. 197
Referred to. Chenard and Co. *v.* Joachim Arissol - **J. C. 127**

Board of Trustees of Lethbridge Irrigation District v. *Independent Order of Foresters and Attorney-General for Canada* [1940] A. C. 513.
Referred to. Attorney-General for Saskatchewan *v.* Attorney-General for Canada and Others **J. C. 110**

Brabo, The - - - - [1948] P. 33
Affirmed. Tyne Improvement Commissioners *v.* Armement Anversois S/A (The Brabo) **H. L. (E.) 326**

Bradlaugh v. *Clarke* (1883) 8 App. Cas. 354
Considered and applied. Tumahole Bereng *v.* The King **J. C. 253**

Bridgewater Navigation Co., In re [1891] 2 Ch. 317.
Approved. Scottish Insurance Corporation, Ld. *v.* Wilsons & Clyde Coal Co., Ld. **H. L. (Sc.) 462**

Bubb v. *Yelverton* (1870) L. R. 9 Eq. 471
Overruled. Hill *v.* William Hill (Park Lane), Ld. **H. L. (E.) 530**

Chatterley-Whitfield Collieries, Ld., In re [1948] W. N. 367.
Affirmed. Prudential Assurance Co., Ld. *v.* Chatterley-Whitfield Collieries, Ld. **H. L. (E.) 512**

Chisholm v. *London Passenger Transport Board* [1939] 1 K. B. 426.
Approved. London Passenger Transport Board *v.* Upson **H. L. (E.) 155**

Coats Trusts, In re. Coats v. *Gilmour* [1948] Ch. 340.
Affirmed. Gilmour *v.* Coats **H. L. (E.) 426**

Cocks v. *Manners* (1871) L. R. 12 Eq. 574
Approved. Gilmour *v.* Coats **H. L. (E.) 426**

Commissioners of Taxation v. *Kirk* [1900] A. C. 588.
Referred to. International Harvester Co. of Canada, Ld. *v.* Provincial Tax Commission and Others - - - **J. C. 36**

Comptoir d' Achat et de Vente du Boerenbond Belge S/A v. *Luis de Ridder Limitada* (*The Julia*) [1947] W. N. 261; 177 L. T. 648.
Reversed - **H. L. (E.) 293**

Cox v. *Feeney* - (1863) 4 F. & F. 13
Referred to. Perera (M. G.) *v.* Peiris and Another **J. C. 1**

Cutler v. *Wandsworth Stadium, Ld.* [1948] 1 K. B. 291.
Affirmed. Cutler *v.* Wandsworth Stadium, Ld. - **H. L. (E.) 398**

Davison v. *Duncan* (1857) 7 E. & B. 229
Referred to. Perera (M. G.) *v.* Peiris and Another **J. C. 1**

Diggle v. *Higgs* - (1877) 2 Ex. D. 422
Dicta dissented from. Hill *v.* William Hill (Park Lane), Ld. **H. L. (E.) 530**

Echo, The - - - - [1917] P. 132
Referred to. Oivind Lorentzen as Director of Shipping and Curator of the Royal Norwegian Government *v.* The Alcoa Rambler (Alcoa Steamship Co., Inc., Owners) **J. C. 236**

Gipps v. *McElhone* (1881) 2 N. S. W. 18
Approved. Chenard and Co. *v.* Joachim Arissol - **J. C. 127**

Hyams v. *Stuart King* [1908] 2 K. B. 696
Overruled. Hill *v.* William Hill (Park Lane), Ld. **H. L. (E.) 530**

Karlshamns Oljefabriker (A/B) v. *Monarch Steamship Co., Ld.* [1947] S.C. 179.
Affirmed. MONARCH STEAMSHIP CO., LD. *v.* KARLSHAMNS OLJEFABRIKER (A/B) **H. L. (Sc.) 196**

Kauri Timber Co., Ld. v. *Commissioner of Taxes* [1913] A. C. 771.
Distinguished. MOHANLAL HARGOVIND OF JUBBULPORE *v.* COMMISSIONER OF INCOME TAX, CENTRAL PROVINCES AND BERAR, NAGPUR **J. C. 521**

Kielley v. *Carson* (1842) 4 Moo. P. C. 63
Referred to. CHENARD AND CO. *v.* JOACHIM ARISSOL - **J. C. 127**

Kitano Maru, Ss. v. *Ss. Otranto* [1931] A. C. 194.
Referred to. OIVIND LORENTZEN, AS DIRECTOR OF SHIPPING AND CURATOR OF THE ROYAL NORWEGIAN GOVERNMENT *v.* THE ALCOA RAMBLER (ALCOA STEAMSHIP CO., INC., OWNERS) **J. C. 236**

Ladore v. *Bennett* - - [1939] A. C. 468
Referred to. ATTORNEY-GENERAL FOR SASKATCHEWAN *v.* ATTORNEY-GENERAL FOR CANADA **J. C. 110**

Lynch v. *Nurdin* - - (1841) 1 Q. B. 29
Applied. YACHUK *v.* OLIVER BLAIS CO., LD. - - - **J. C. 386**

Macintosh v. *Dun* - - [1908] A. C. 390
Referred to. PERERA (M. G.) *v.* PEIRIS AND ANOTHER **J. C. 1**

Mahlikilili Dhalamini v. *The King* [1942] A. C. 583.
Applied. TUMAHOLE BERENG *v.* THE KING - - **J. C. 253**

Makin v. *Attorney-General for New South Wales* [1894] A. C. 57.
Considered. NOOR MOHAMED *v.* THE KING - - - **J. C. 182**

Maxwell v. *Director of Public Prosecutions* [1935] A. C. 309.
Referred to. NOOR MOHAMED *v.* THE KING - - **J. C. 182**

Metcalfe & Sons, Ld., In re [1933] Ch. 142
Overruled. SCOTTISH INSURANCE CORPORATION, LD. *v.* WILSONS & CLYDE COAL CO., LD. **H. L. (Sc.) 462**

Midleton's Settlement, In re [1947] Ch. 583
Affirmed. MIDLETON (EARL) *v.* COTTESLOE (BARON) **H. L. (E.) 418**

Millar v. *Galashiels Gas Co., Ld.* [1948] S. L. T. 282.
Affirmed. GALASHIELS GAS CO., LD. *v.* O'DONNELL OR MILLAR **H. L. (Sc.) 273**

Nova Scotia Steel Co., Ld. v. *Sutherland Steam Shipping Co., Ld.* (1899) 5 Com. Cas. 106.
Dictum of Bigham J. disapproved. TANKEXPRESS A/S *v.* COMPAGNIE FINANCIÈRE BELGE DES PETROLES S.A. - - **H. L. (E.) 76**

O. Martineau & Sons, Ld. v. *Montreal City* [1932] A. C. 113.
Considered. LABOUR RELATIONS BOARD OF SASKATCHEWAN *v.* JOHN EAST IRON WORKS, LD. **J. C. 134**

Reference re Authority to Perform Functions vested by the Adoption Act, etc. [1938] S. C. R. (Can) 398.
Considered. LABOUR RELATIONS BOARD OF SASKATCHEWAN *v.* JOHN EAST IRON WORKS, LD. **J. C. 134**

Rex v. *Bond* - - [1906] 2 K. B. 389
Approved. NOOR MOHAMED *v.* THE KING - - - **J. C. 182**

Rex v. *John* S. A. L. R. [1943] T. P. D. 295
Referred to. TUMAHOLE BERENG *v.* THE KING - - **J. C. 253**

Rex v. *Sims* - - - [1946] K. B. 531
Dictum of Lord Goddard L.C.J. at 539 criticized. NOOR MOHAMED *v.* THE KING - - **J. C. 182**

Rex v. *Wright* - - (1799) 8 T. R. 293
Referred to. PERERA (M. G.) *v.* PEIRIS AND ANOTHER **J. C. 1**

Riel v. *The Queen* (1885) 10 App. Cas. 675
Referred to. CHENARD AND CO. *v.* JOACHIM ARISSOL **J. C. 127**

Roanoke, The - - - [1908] P. 231
Referred to. OIVIND LORENTZEN, AS DIRECTOR OF SHIPPING AND CURATOR OF THE ROYAL NORWEGIAN GOVERNMENT *v.* THE ALCOA RAMBLER (ALCOA STEAMSHIP CO., INC., OWNERS) - **J. C. 236**

Stoughton, In re - - [1941] Ir. R. 166
Disapproved. MIDLETON (EARL) *v.* COTTESLOE (BARON) **H. L. (E.) 418**

Stuart v. *Bell* - - [1891] 2 Q. B. 341
Referred to. PERERA (M. G.) *v.* PEIRIS AND ANOTHER **J. C. 1**

Thompson v. *The King* [1918] A. C. 221
Dictum of Lord Sumner at 232 qualified. NOOR MOHAMED *v.* THE KING - - - **J. C. 182**

Toronto Corporation v. *York Corporation* [1938] A. C. 415.
Considered. Labour Relations Board of Saskatchewan *v.* John East Iron Works, Ld. **J. C. 134**

Upson v. *London Passenger Transport Board* [1947] K. B. 930.
Affirmed. London Passenger Transport Board *v.* Upson **H. L. (E.) 155**

Varney v. *Hickman* - (1847) 5 C. B. 271
Dicta dissented from. Hill *v.* William Hill (Park Lane), Ld. **H. L. (E.) 530**

Wason v. *Walter* (1868) L. R. 4 Q. B. 73
Referred to. Perera (M. G.) *v.* Peiris and Another - **J. C. 1**

Wilsons & Clyde Coal Co., Ld. v. *Scottish Insurance Corporation, Ld.* [1948] S. C. 360.
Affirmed. Scottish Insurance Corporation, Ld. *v.* Wilsons & Clyde Coal Co., Ld. **H. L. (E.) 462**

STATUTES JUDICIALLY CONSIDERED

1838

Small Tenements Recovery Act, 1838 (1 & 2 *Vict., c.* 74), *s.* 1. Shelley *v.* London County Council. Harcourt *v.* Same **H. L. (E.) 56**

1845

Gaming Act, 1845 (8 & 9 *Vict., c.* 109), *s.* 18. Hill *v.* William Hill (Park Lane), Ld. - - **H. L. (E.) 530**

1865

Colonial Laws Validity Act, 1865 (28 & 29 *Vict., c.* 63), *ss.* 2, 5. Chenard and Co. *v.* Joachim Arissol **J. C. 127**

1867

British North America Act, 1867 (30 & 31 *Vict., c.* 3), *s.* 91, *sub-s.* 19; *s.* 92, *sub-s.* 13. Attorney-General for Saskatchewan *v.* Attorney-General for Canada and Others **J. C. 110**

——— ——— *s.* 96. Labour Relations Board of Saskatchewan *v.* John East Iron Works, Ld. **J. C. 134**

1882

Settled Land Act, 1882 (45 & 46 *Vict., c.* 38), *s.* 22, *sub-s.* 5. Midleton (Earl) *v.* Cottesloe (Baron) **H. L. (E.) 418**

1894

Finance Act, 1894 (57 & 58 *Vict., c.* 30), *ss.* 1, 2, *sub-s.* 2. Midleton (Earl) *v.* Cottesloe (Baron) **H. L. (E.) 418**

1918

Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *sch. D., Case V.* Inland Revenue Commissioners *v.* Reid's Trustees **H. L. (Sc.) 361**

1922

Irish Free State Constitution Act, 1922 (*sess.* 2) (13 *Geo.* 5, *c.* 1), *s.* 1, *sch. I. art.* 73. Midleton (Earl) *v.* Cottesloe (Baron) **H. L. (E.) 418**

1929

Companies Act, 1929 (19 & 20 *Geo.* 5, *c.* 23), *s.* 55, *sub-s.* 1. Scottish Insurance Corporation, Ld. *v.* Wilsons & Clyde Coal Co., Ld. **H. L. (Sc.) 462**

Prudential Assurance Co., Ld. *v.* Chatterley-Whitfield Collieries, Ld. - **H. L. (E.) 512**

1934

Housing Act, 1934 (26 *Geo.* 5 & 1 *Edw.* 8, *c.* 51), *s.* 83, *sub-s.* 1; *s.* 156, *sub-ss.* 1, 2. Shelley *v.* London County Council. Harcourt *v.* Same - - **H. L. (E.) 56**

Betting and Lotteries Act (24 & 25 *Geo.* 5, *c.* 58), *s.* 11, *sub-s.* 2 (*b*); *s.* 30, *sub-s.* 1. Cutler *v.* Wandsworth Stadium, Ld. - **H. L. (E.) 398**

1937

Factories Act, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 67), *s.* 22, *sub-s.* 1; *s.* 152, *sub-s.* 1. Galashiels Gas Co., Ld. *v.* O'Donnell or Millar **H. L. (Sc.) 275**

1946

Coal Industry Nationalisation Act, 1946 (9 & 10 *Geo.* 6, *c.* 59), *s.* 25. Scottish Insurance Corporation, Ld. *v.* Wilsons & Clyde Coal Co., Ld. **H. L. (Sc.) 462**

Prudential Assurance Co., Ld. *v.* Chatterley-Whitfield Collieries, Ld. - - **H. L. (E.) 512**

CANADA

1927

Income War Tax Act, R. S. C. 1927, *c.* 97 (*as amended by s.* 10 *of c.* 34 *of S. C.* 1940), *s.* 5, *sub-s.* 1 (*a*). D. R. Fraser and Co., Ld. *v.* Minister of National Revenue **J. C. 24**

1932

Income Tax Act, 1932, *St. Sask., c.* 9, *s.* 7, *sub-s.* 4; *s.* 21*a*. International Harvester Co. of Canada, Ld. *v.* Provincial Tax Commission and Others - - **J. C. 36**

1936

Income Tax Act, 1936, *St. Sask., c.* 15, *s.* 23. International Harvester Co. of Canada, Ld. *v.* Provincial Tax Commission and Others **J. C. 36**

1944

Farm Security Act, 1944, *c.* 30 *of Statutes of Saskatchewan*, 1944 (*second session*) (*as amended by s.* 2 *of c.* 28 *of Statutes of Saskatchewan*, 1945), *s.* 6. Attorney-General for Saskatchewan *v.* Attorney-General for Canada and Others **J. C. 110**

Trade Union Act, 1944 (*St. Sask.* (*second sess.*) *c.* 69) (*as amended by c.* 108 *of* 1945, *c.* 98 *of* 1946 *and c.* 102 *of* 1947), *s.* 5 (*e*). Labour Relations Board of Saskatchewan *v.* John East Iron Works, Ld. **J. C. 134**

INDIA

1922

Indian Income-tax Act (*XI. of* 1922) (*as amended by the Indian Income-tax* (*Amendment*) *Act*, 1939), *s.* 10, *sub-s.* 2 (xii). Mohanlal Hargovind of Jubbulpore *v.* Commissioner of Income Tax, Central Provinces and Berar, Nagpur **J. C. 521**

RULES AND ORDERS JUDICIALLY CONSIDERED

R. S. C. Or. 11, *r.* 1 (*g*), *r.* 4. Tyne Improvement Commissioners *v.* Armement Anversois S/A (The Brabo) **H. L. (E.) 326**

1941

Pedestrian Crossing Places (*Traffic*) *Regulations*, 1941 (*St. R. & O.* 1941, *No.* 397), *reg.* 3. London Passenger Transport Board *v.* Upson **H. L. (E.) 155**

CANADA

Regulations issued pursuant to s. 7, *sub-s.* 4, *of Income Tax Act*, 1932, *reg.* 3. International Harvester Co. of Canada, Ld. *v.* Provincial Tax Commission and Others **J. C. 36**

ORDINANCES JUDICIALLY CONSIDERED

BASUTOLAND

Basutoland High Court Proclamation (*No.* 57 *of* 1938) (*as amended by s.* 1 *of No.* 41 *of* 1942), *s.* 7. Tumahole Bereng *v.* The King - - **J. C. 253**

Basutoland Criminal Procedure and Evidence Proclamation (*No.* 59 *of* 1938) (*as amended by s.* 1 *of the Criminal Procedure and Evidence* (*Amendment*) *Proclamation* (*No.* 12 *of* 1944)), *s.* 231. Tumahole Bereng *v.* The King - - - **J. C. 253**

CEYLON

1942

Special Commission (*Auxiliary Provisions*) *Ordinance, No.* 25 *of* 1942, *s.* 6, *sub-s.* 1. Perera (M. G.) *v.* Peiris and Another - **J. C. 1**

SEYCHELLES

Seychelles Penal Code (*Ord. No.* 10 *of* 1904), *s.* 192, *sub-s.* 1 (*a*). Chenard and Co. *v.* Joachim Arissol **J. C. 127**

Letters Patent of August 31, 1903, *cl.* 8. Chenard and Co. *v.* Joachim Arissol - - - **J. C. 127**

Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[PRIVY COUNCIL]

J. C.*

1948

Oct. 13.

PERERA (M. G.) . . . . . APPELLANT;

AND

PEIRIS AND ANOTHER . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF THE ISLAND OF CEYLON.

Ceylon — Defamation — Bribery commission — Report — Sessional paper—Publication in newspaper—Defamatory statement—Action for damages—Privilege—Serving public interest—Roman-Dutch law—Animus injuriandi negatived — Special Commission (Auxiliary Provisions) Ordinance, No. 25 *of* 1942, *s.* 6, *sub-s.* 1*—Construction.*

The respondents, the proprietor and the printer of the *Ceylon Daily News*, on various dates in May, 1943, published in the newspaper a number of extracts from the Official Report of the Bribery Commission—a commission set up under statutory powers by the Governor of Ceylon in August, 1941, to inquire into questions relating to allegations that gratifications had been paid to certain members of the then existing State Council of Ceylon for the purpose of influencing their judgment and conduct in transactions in which they, as members of the Council, were concerned. The report was issued by the Government of Ceylon as a Sessional Paper and was on sale to the public, copies being sent free to all newspapers in Ceylon. Among the extracts from the Sessional Paper, which were published in the *Ceylon Daily News* without any comment and, as found by the courts below, without any malice express or implied, was the following comment by the Bribery Commissioner on the manner in which the appellant—a distiller of arrack (a spiritous liquor) and also a doctor—had given evidence, taken in camera, before him : " Dr. M. G. Perera, who gave evidence, was completely " lacking in frankness and pretended that he knew very much less " about the transaction than he actually did." The " transaction " related to an allegation that certain members of the State Council had received a gratification from contractors to the Government for the supply of arrack, in connexion with negotiations for the extension of their contracts. On a claim by the appellant against the respondents for damages for defamatory libel :—

**Present:* LORD UTHWATT, LORD MORTON OF HENRYTON, LORD MACDERMOTT AND SIR JOHN BEAUMONT.

Held, applying the wide general principle which underlies the defence of privilege in all its aspects—that the requirements of public interest are served by publication—that the immunity afforded by privilege attached to the publication by the respondents of the report considered as a whole. In considering whether reports of proceedings of bodies which are not judicial or parliamentary are privileged the status of those bodies taken alone is not conclusive to establish that the public interest is forwarded by publication, and it is necessary to consider the subject-matter dealt with in the particular report. If it appears that it is to the public interest that it should be published privilege will attach. If malice in the publication is not present and the public interest is served by the publication, the publication of the report must be taken for the purposes of Roman-Dutch law as being in truth directed to serving that interest, and animus injuriandi, which is an essential element in proceedings for defamation in that law, is negatived. In the present case the due administration of the affairs of Ceylon required that the report in light of its origin, contents and relevance to the conduct of the affairs of Ceylon and the course of legislation should receive the widest publicity.

Macintosh v. *Dun* [1908] A. C. 390, *Stuart* v. *Bell* [1891] 2 Q. B. 341, *Rex* v. *Wright* (1799) 8 T. R. 293, 298, *Davison* v. *Duncan* (1857) 7 E. & B. 229, 231 and *Wason* v. *Walter* (1868) L. R. 4 Q. B. 73, referred to.

Further, the report was not divisible, and the statement therein relating to the appellant's alleged conduct was germane and appropriate to the occasion and did not fall to be distinguished in any degree from the other contents of the report.

Cox v. *Feeney* (1863) 4 F. & F. 13, referred to.

Held, lastly, that the publication was not of " the name and the " evidence or any part of the evidence " and was not therefore a breach of s. 6, sub-s. 1, of Ordinance No. 25 of 1942, which provided that " where the evidence of any witness is heard in camera " the name and the evidence or any part of the evidence of that " witness shall not be published by any person save with the " authority of the Commissioner."

Decree of the Supreme Court of Ceylon (1946) 47 C. N. L. R. 49, affirmed.

J. C.
1948
PERERA
(M. G.)
v.
PEIRIS.

APPEAL (No. 2 of 1947) from a judgment and decree of the Supreme Court of the Island of Ceylon (February 12, 1946) which dismissed an appeal by the present appellant, Dr. M. G. Perera, from a judgment and decree of the District Court of Colombo (June 19, 1944) which had dismissed an action for damages for defamatory libel brought by Dr. Perera against the respondents, A. V. Peiris, the printer and publisher of the *Ceylon Daily News*, and the Associated Newspapers of Ceylon, Ld., the proprietor of that newspaper.

On various dates in May, 1943, the respondents published in the *Ceylon Daily News* a number of extracts from the Official Report of the Bribery Commission, a commission set up under the provisions of the Commissions of Inquiry Ordinance (c. 276 of the Revised Legislative Enactments of Ceylon) by the Governor of Ceylon in August, 1941, to inquire into questions relating to allegations that gratifications had been offered, given or paid to certain members of the then existing State Council of Ceylon for the purpose of influencing their judgment, conduct, etc., in transactions in which they, as members of the Council, were concerned. The report was issued by the Government of Ceylon as a Sessional Paper and, as such, was on sale to the public at the price of 90 cents. Copies were sent free by the Government Printer to all the newspapers in Ceylon, including the *Ceylon Daily News*. Among the extracts from the Sessional Paper which were published in the *Ceylon Daily News* without any comment and, as found by the courts below, without any malice express or implied, was the following short comment by the Bribery Commissioner (L. M. D. de Silva K.C.) on the manner in which the appellant, who was a distiller of arrack and also a doctor, had given evidence before him : " Dr. M. G. Perera, who gave evidence, was completely " lacking in frankness and pretended that he knew very much " less about the transaction than he actually did." The " transaction " related to an allegation that certain members of the State Council had received a gratification from contractors to the Government for the supply of arrack, in connexion with negotiations for the extension of their contracts.

The appellant claimed damages from the respondents for defamatory libel, and the main question for determination in this appeal was whether or not under Roman-Dutch law, which admittedly was the law applicable to these proceedings, an action against a newspaper for damages for defamation would lie in the circumstances generally outlined above.

J. C.
1948
Perera (M. G.) v. Peiris.

The District Court of Colombo, as stated, dismissed the action, and on appeal the decree of the District Judge was affirmed by the Supreme Court of Ceylon (Howard C.J. and de Silva J.).

The relevant statutory provisions and the material terms of the commissioner's report appear from the judgment of the Judicial Committee.

1948. May 3, 4, 5, 6 and 10. *Slade K.C.* and *Stephen Chapman* for the appellant. The words complained of were defamatory of the appellant, and there was no evidence that they were true in substance or in fact. There was no plea of justification on the record, and no part of the words complained of amounted to comment. With regard to the Ordinances, if any privilege could in law attach to the publication in a newspaper of a fair and accurate report of an extract from the proceedings of the commission, so far, if at all, as they were open to the public, no privilege could in any event attach to a report of any part of proceedings which the commissioner decided to hold in camera, and a fortiori to any part the publication of which was not authorized by the commissioner. This appeal turns on Roman-Dutch law, and the first submission is that while it is true that Roman-Dutch law enables a defendant to an action for defamation to escape liability if he can negative animus injuriandi, it is submitted that he can only do this by proving one of the recognized defences to such an action, e.g., privilege or fair comment. The mere publication of words which are, in fact, defamatory, imports animus injuriandi unless an affirmative defence is established. It was held in *Tothill* v. *Foster* (1) that proof that a defamatory statement was uttered with no intention of slandering or injuring the plaintiff is not a defence to a claim for damages for defamation, and again, in *Mankowitz* v. *Geyser* (2), that when defamatory words are used animus injuriandi is by law presumed to exist, and that that presumption cannot be rebutted save by proving that the case falls within certain definite and recognized categories of privilege, exemption or excuse; the question there was whether the defendant had "established a legal ground of privilege, fair comment, or other "excuse." [Reference was also made to Nathan's Law of Defamation in South Africa, pp. 87–8; note 17 on p. 88; p. 95; Maasdorp, Institutes of South African Law, 4th ed.,

(1) (1925) S. A. L. R., T. P. D. 857.

(2) (1928) S. A. L. R., O. P. D. 138.

vol. 3, p. 143; McKerron, The Law of Delict, 3rd ed., p. 198, and *Serajudeen* v. *Allagappa Chetty* (1), which shows what animus injuriandi means in Cingalese law.]

The next submission is that the commission of inquiry conducted under the Ordinance was not a judicial proceeding so as to clothe with a qualified privilege a fair and accurate report in a newspaper of its findings. This either is or is not a report of a judicial proceeding, or it is a republishing of an extract from a Sessional Paper. No privilege can in any event attach to a report of judicial proceedings which are not publicly held. If, in a fair and accurate report, the newspaper reproduces any proof of the evidence taken in camera, they have no defence. On the question whether this was a judicial proceeding, perhaps the nearest case is *O'Connor* v. *Waldron* (2); see also *Smith* v. *National Meter Co., Ld.* (3). Section 7, sub-s. 3, of Ordinance No. 25 of 1942 says that "for the purpose of the effectual "exercise of the powers conferred on the Commission . . . . "the Commissioner shall be deemed to be a court . . . .," but here there is no lis, no cross-examination of witnesses, etc., and if there is anything less than a judicial inquiry it is this particular case.

The next point is that no privilege attaches to the publication in a newspaper of extracts from a Sessional Paper issued by the Government of Ceylon. No privilege would attach in this country to the report in a newspaper of an extract from the Blue-book, and there is no distinction in the law of Ceylon and this country on this point. It was held in *Smith & Co.* v. *S. A. Newspaper Co.* (4) that the bona fide publication in a newspaper of a fair and impartial report of a discussion at a meeting of the Table Bay Harbour Board on a matter of public interest was not actionable, even if it included injurious statements regarding the conduct of an individual. If that case was rightly decided it was decided on its particular facts; it is submitted, however, that it was wrongly decided. Another private meeting case is *Philpott* v. *Whittal, Elston and Crosby & Co.* (5). South African law is the same as English law requiring the reciprocity of interests and duty: Nathan, The Law of Defamation, pp. 216, 226 and 219. [Reference was also made to *Allbutt* v. *General Council of Medical Education*

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(1) (1919) 21 C. N. L. R. 428, 430.

(2) [1935] A. C. 76, 81.

(3) [1945] K. B. 543, 546–7.

(4) (1906) 23 Cape of Good Hope, S. C., 310.

(5) (1907) E. D. C. (Cape of Good Hope L. R.) 193, 208.

J. C.
1948
PERERA (M. G.) v. PEIRIS.

and Registration (1) and to Gatley on Libel and Slander, 3rd ed., p. 358.] The publication of the words complained of was not for the public benefit. The respondents were certainly not justified in adding something in the report which the public were not interested in at all. The appellant was not a State Councillor, he was not charged with, or tried for, perjury, and it is contested that the whole of the paragraph in question has any legitimate public interest. If there ever was a duty on a newspaper to its readers it would be to assist in the dissemination of that which it was right that they should know. It was said in *Adam* v. *Ward* (2) "but the fact that an occasion is "privileged does not necessarily protect all that is said or "written on that occasion." No privilege can attach in any event to a publication which is contrary to law, and it is an infringement of s. 6, sub-s. 1, of Ordinance No. 25 of 1942 merely to publish the name.

With regard to justification, assuming it to have been properly raised, the onus was on the respondents, if they intended to support that plea, to prove by direct evidence that the allegations conveyed by the words complained of were true, and no finding by the commissioner could be of any assistance to them. [Reference was made to *Sutherland* v. *Stopes* (3), and *Ponsford* v. *Financial Times, Ld. and Hart* (4).] As to fair comment, the whole basis of the defence of fair comment disappeared because a comment cannot be fair which is built upon facts which are not proved to have been truly stated—there cannot be comment without facts to support it. The judgments of the District Court of Colombo and of the Supreme Court were wrong.

Pritt K.C., *Sir Valentine Holmes K.C.*, *Handoo* and *C. E. L. Wickremesinghe* for the respondents. It would be an extraordinary and undesirable state of the law if a newspaper which bona fide republished a report published by the Government of a quasi-judicial inquiry into a very serious matter was told that it could only do so at the price of paying damages for every statement of the commissioner which somebody was not in a position to prove up to the hilt, that is, that there can be no privilege in any shape or form in the law of Ceylon. That, on various grounds, is not the position. First, with regard to animus injuriandi, the true doctrine of Roman-Dutch law as applied in Ceylon is that one begins with the proposition that defamation is based on injuria, and secondly,

(1) (1889) 23 Q. B. D. 400.
(2) [1917] A. C. 309, 320.
(3) [1925] A. C. 47, 55, et seq.
(4) (1900) 16 T. L. R. 248.

J. C.
1948
PERERA (M. G.) v. PEIRIS.

on animus injuriandi. There is no doubt that the absence of animus injuriandi is emphatically a defence to an action for defamation in Roman-Dutch law. That law has developed quite a number of defences, most of them well known and not dissimilar to those in England, e.g., justification, fair comment, privilege. The only real question on this branch of Roman-Dutch law is, is there or is there not a closed shop? There is not, in that there is still definitely a general category, so that it is right to say, as Maasdorp says, one has to come within justification, fair comment, and any other grounds on which it might be found that there is animus injuriandi. It is quite plain that in Roman-Dutch law there is a category that can be called " any other reasonable cause." It is enough to show in a general category solid reasons why there is not animus injuriandi in this case. The Roman-Dutch law under the rules of animus injuriandi still retains a capacity to extend defences, particularly the defence of a privilege kind, to classes of cases not covered by the present well-recognized justification. [Reference was made to De Villiers, The Roman and Roman-Dutch Law of Injuries, 1899 ed., pp. 189, 191, 193; G. T. Morice, English and Roman-Dutch Law, 2nd ed., pp. 251–3; McKerron, The Law of Delict, 3rd ed., p. 197; Pereira, Laws of Ceylon (1913) p. 733; and Nathan, Common Law of South Africa (1906 ed.), vol. 3, pp. 1598, 1599, 1607, 1609 and 1612.] The authorities fall into three groups: (*a*) The Transvaal cases, which appear at first sight to go against what has been submitted above, but it is contended that they do not; (*b*) two Cape of Good Hope decisions; and (*c*) the Ceylon cases. So far from the Transvaal cases being a general declaration of the Roman-Dutch law as it applies in South Africa, there is a conflict between the Cape of Good Hope and the Transvaal on this very point, and Ceylon has made it clear that it does not agree with the Transvaal. There is nothing in the reasoning or in the decision of the first Transvaal case, *Jooste* v. *Claassens* (1) which throws the slightest doubt in the respondents' way, and the same observation applies to *Laloe Janoe* v. *Bronkhorst* (2)—the decision is against me, but it is one of South Africa, not Ceylon. *Tothill* v. *Foster* (3) implies a doctrine opposite to that for which I am contending, and repeats the error made in *Laloe Janoe's* case (2). *Mankowitz*

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(1) (1916) S. A. L. R., T. P. D. 723, 727.

(2) (1918) S. A. L. R., T. P. D. 65.

(3) (1925) S. A. L. R., T. P. D. 857.

v. *Geyser* (1) does not even discuss any of the above cases and does not carry one very far, and is certainly not binding in Ceylon. The Cape of Good Hope cases are *Bennett* v. *Morris* (2) and *Smith & Co.* v. *S. A. Newspaper Co.* (3). So the Transvaal and the Orange Free State say one thing and the Cape another, and Ceylon says the same as the Cape. In *David* v. *Bell* (4) it was said that " the Roman-Dutch law allows proof, not only " of such circumstances as that the occasion was privileged, " but of any other circumstances that furnished a reasonable " excuse for the use of the words complained of." *Silva* v. *Ramen Chetty* (5) is not as strong as *David's* case (4), but it shows the way in which the courts in Ceylon have approached the matter. If there is a general class, and animus injuriandi can be disproved by showing any other reasonable cause, surely the present case is a very strong one. It can be put in two ways, quite generally, and with reference to a specific privilege defence of the publication of the Sessional Paper. Put generally, in a Colony there arises a very serious scandal and the Governor appoints a commissioner of legal standing to inquire and report, the Governor is satisfied with the report and has the whole of it published contemporaneously with the introduction of a Bill to impose sanction on those involved ; the Governor sends copies to the newspapers, and the only English language newspaper in the Colony proceeds to print it and makes no comment ; surely it was the proper thing in the public interest for that newspaper to tell the Ceylon public what the commissioner had told the Governor and what the Governor had printed and published and acted upon. It really is the strongest possible case for saying that there were some other circumstances to negative animus injuriandi. [Reference was also made to *Basner* v. *Trigger* (6) and McKerron, The Law of Delict, p. 198.]

The next point is that on its true construction Ordinance No. 25 of 1942 does not prohibit publication. Section 6 does not mean that it can never be published; it must mean except with the authority of the commissioner so long as he has seizin ; but when the commission has come to an end—and here he became functus officio before the Government published the report—it was no longer possible, and, therefore, necessary, to obtain his authority to publish. With regard to justification, the plaintiff by his counsel for one reason or another deliberately withdrew from any suggestion of justification ; he said, in effect, "I will let them say it is true because I will say that it is not for "the public interest." [Reliance is placed on s. 114 of the Evidence Act.] The respondents have proved facts which negative the existence of any animus injuriandi, and this affords a complete defence under Roman-Dutch law. The publication being part of a fair and accurate report of a Sessional Paper was privileged and malice was negatived.

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(1) (1928) S. A. L. R., O. P. D. 138.

(2) (1893) Cape of Good Hope L. R., S. C. 223, 226.

(3) (1906) 23 Cape of Good Hope L. R., S. C. 310.

(4) (1913) 16 C. N. L. R. 318.

(5) (1895) 1 C. N. L. R. 225.

(6) (1946) S. A. L. R., A. D. 83, 94.

Sir Valentine Holmes K.C. followed. This case has to be decided in accordance with the law of Ceylon, but English law has been introduced into the case in this way ; it was said for the appellant that in Roman-Dutch law absence of animus injuriandi can only be proved by making good one of the recognized defences in a defamation action, one of which is privilege, and it was then said that in accordance with certain decisions of the Transvaal and the Orange Free State the principles relating to privilege are the same in Roman-Dutch law as in English common law, and, finally, that this publication would not be privileged in English common law. It is submitted that it would be privileged in English common law. I do not ask the Board to say that this case comes within some particular category, such as a report of judicial proceedings or the report of a Sessional Paper ; the true fact is that in each of these cases the court has applied the principle which the common law has established by the process of evolution, which can be shortly stated. Going back to the middle of the eighteenth century—two hundred years ago—the reply of the common law to the question, what are the defences when a defamatory publication has been made, would have been, in one word, "justification" : it would not have meant what justification means to-day. Coming fifty years nearer—to the beginning of the nineteenth century—the word "privilege" in regard to libel was recognized, and if it had then been asked what the defences were to a libellous publication the answer would have been slightly more precise : (*a*) truth ; (*b*) the existence of circumstances which negative a presumption of malice ; and (*c*) the existence of a set of circumstances in which the presumption is negatived but in which the plaintiff is not allowed to prove actual malice. Those three would have been the same as our present-day justification, privilege, and absolute privilege. The word "privilege" in libel actions had not been used at all at the beginning of the nineteenth century, but, during the nineteenth century, beginning about 1820, one begins to find judges using it consistently, but saying that it is an inapt word. They were using it as meaning the existence of a set of circumstances in which the presumption of malice was negatived. It was said in *Gilpin* v. *Fowler* (1) that "instead of the "expression 'privileged communication' it would be more "correct to say that the communication was made on an "occasion which rebutted the presumption of malice." The judges having to face the problem of what would be the circumstances in which the presumption of malice would be negatived, went on two lines, duty and interest, and the public good and for the public interest. Those two principles marched forward hand in hand and were not regarded as inconsistent: *Cox* v. *Feeney* (2); *Adam* v. *Ward* (3); *Wason* v. *Walter* (4) which was the first case to decide that the publication in a newspaper of a parliamentary proceeding was privileged, and in that case one also gets the defence of fair comment appearing in regard to a leading article; *Henwood* v. *Harrison* (5), which comes very near to the facts to the present case, but it is not desired to argue this case from facts to facts; it was said in *Henwood's* case (5) that "the privilege so established in "respect of duty or interest, however necessary or valuable, "must be exercised within the limits which the interest or duty "indicates." In *Merivale* v. *Carson* (6) the headnote states "*Henwood* v. *Harrison* dissented from"; that is wrong, see *Thomas* v. *Bradbury, Agnew & Co., Ld.* (7). [Reference was also made to *Allbutt* v. *General Council of Medical Education and Registration* (8), *Mangena* v. *Wright* (9), Spencer Bower on Actionable Defamation, 2nd ed., p. 127, note (*a*), and Fraser on Libel and Slander, 6th ed., 205.] Applying the above principles to the present case; first, there is common talk that certain members of the State Council were taking bribes; then there is the appointment of the commissioner under the Ordinance, which is given statutory effect; then there is the

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(1) (1854) 9 Ex. 615, 623.

(2) (1863) 4 F. & F. 13.

(3) (1915) 31 T. L. R. 299, 303.

(4) (1868) L. R. 4 Q. B. 73, 87, 96.

(5) (1872) L. R. 7 C. P. 606, 623.

(6) (1887) 20 Q. B. D. 275.

(7) [1906] 2 K. B. 627.

(8) 23 Q. B. D. 400, 412.

(9) [1909] 2 K. B. 958, 977.

J. C.
1948
PERERA (M. G.) v. PEIRIS.

report of the commissioner, and a Bill which would have the effect of rendering five members of the Council liable to removal from the State Council. It is difficult to imagine anything that could be of greater common interest to the public—there could be nothing of greaer interest for the public than to know what the findings of the commissioner might be and how they were arrived at. There is, therefore, a state of affairs which, in excelsis, is a matter of public interest. The word " duty " has to be considered in the sense in which it is used throughout the authorities hand in hand with this public interest. It would, it is submitted, shock any person of common sense if this publication by this newspaper was not privileged in Ceylon.

Slade K.C. replied, and referred to Gatley on Libel and Slander, 3rd ed., pp. 277, 280–1 and 358, to Fraser on Libel and Slander, 7th ed., p. 147 and to *Davis* v. *Duncan* (1). There can be no interest for the public to be informed through the medium of this newspaper of untrue defamatory statements about one of the persons who gave evidence in the case. While the public were no doubt interested to know whether any members of the State Council were guilty or not of taking bribes, they had no general interest to know that a particular man who had given evidence had or had not given candid evidence. Even if there is an interest in the public, there was no duty on the newspaper to publish it: *Chapman* v. *Lord Ellesmere* (2); *Scott* v. *Scott* (3); *Arnold* v. *King-Emperor* (4). The occasion has never arisen before for a newspaper to plead that it was under a duty to publish the matter. *Purcell* v. *Sowler* (5), it is submitted, should be overruled. *Silva* v. *Ramen Chetty* (6) and *David* v. *Bell* (7) are, it is submitted, based upon a misreading of Voet 47.10.20.

Oct. 13. The judgment of their Lordships was delivered by LORD UTHWATT. This is an appeal from the judgment of the Supreme Court of Ceylon affirming the dismissal by the District Court of Colombo of an action brought by the appellant, Dr. M. G. Perera, in which he claimed damages for defamatory libel from the respondents, who are the printer and publisher and owners of a newspaper called the *Ceylon Daily News*. The libel complained of appeared in the issue of that paper of

(1) (1874) L. R. 9 C. P. 396.
(2) [1932] 2 K. B. 431, 474.
(3) [1913] A. C. 417, 452.
(4) (1914) 30 T. L. R. 462, 468.
(5) (1877) 2 C. P. D. 215, 223.
(6) 1 C. N. L. R. 225.
(7) 16 C. N. L. R. 318.

May 25, 1943, and consisted of an extract from the published report of a commissioner who had been appointed under statutory powers to inquire into certain matters. The extract ran as follows:

"Dr. M. G. Perera who gave evidence was completely "lacking in frankness and pretended that he knew very much "less about the transaction than he actually did."

The respondents took all defences. They denied that the words were defamatory—a formal defence in the circumstances. The other defences were not formal. They pleaded justification in the sense that the statement was true and that its publication was for the public benefit. Fair comment was pleaded. Privilege was relied on upon two grounds, first, that the proceedings before the commissioner were judicial proceedings and the extract was part of an accurate report of those proceedings, and second, that, apart from the supposed judicial nature of the proceedings, the circumstances were such that the publication in the newspaper of the report was made on a privileged occasion. Neither the pleadings, the issues settled in the course of the proceedings, nor the conduct of the case at the trial, in any way limited the field of defence open to the respondents. On the settlement of the issues in the action it was made clear that the appellant did not set up express malice with a view to destroying any qualified privilege that might exist.

The action arose in the following circumstances. It appears that in 1941 there were rumours in Ceylon that bribes had been offered to and accepted by members of the State Council. On August 13, 1941, the Governor, pursuant to a resolution passed by the State Council on May 15, 1941, set up a Commission of Inquiry under the Commissions of Inquiry Ordinance (No. 9 of 1872). Under the terms of the appointment Mr. L. M. D. de Silva K.C. was appointed the Governor's Commissioner for the purpose of inquiring into and reporting on the following questions:

"(*a*) Whether gratifications by way of gift, loan, fee, "reward, or otherwise, are or have been offered, promised, "given or paid to members of the existing State Council; "with the object or for the purpose of influencing their "judgment or conduct in respect of any matter or transaction "for which they, in their capacity as members of that "Council or of any Executive or other Committee thereof, "are, have been, may be, or may claim to be, concerned, "whether as of right oı otherwise: and

J. C.

1948

Perera (M. G.) v. Peiris.

"(*b*) whether such gratifications are or have been solicited, "demanded, received or accepted by members of the existing "State Council as a reward or recompense for any services "rendered to any person or cause, or for any action taken "for the advantage or disadvantage of any person or cause, "or in consideration of any promise or agreement to render "any such services or to take any such action, whether as of "right or otherwise, in their capacity as members of that "Council or of any Executive or other Committee thereof."

The instrument of appointment then contained the following direction by the Governor: "And I hereby authorize and em-"power you to hold all such inquiries and make all such "investigations into the aforesaid matters as may appear "to you to be necessary; and I do hereby require you to trans-"mit to me a report thereon under your hand as early as "possible."

To assist the commissioner in this particular inquiry a further Ordinance (No. 25 of 1942) was passed which empowered the commissioner to hear the evidence or any part of the evidence of any witness in camera. Sections 5, 6, sub-ss. 1 and 2, and 10 (*b*) of the Ordinance run thus:

"5. The Commissioner may, in his discretion, hear the "evidence or any part of the evidence of any witness *in* "*camera* and may, for such purpose, exclude the public and "the Press from the inquiry or any part thereof.

"6.—(1.) Where the evidence of any witness is heard *in* "*camera*, the name and the evidence or any part of the "evidence of that witness shall not be published by any "person save with the authority of the Commissioner.

"(2.) A disclosure, made *bona fide* for the purposes of the "inquiry, of the name or of the evidence or part of the "evidence of any witness who gives evidence *in camera* "shall not be deemed to constitute publication of such name "or evidence within the meaning of sub-section (1.)."

"10. Nothing in this Ordinance shall—

"(*b*) prohibit or be deemed or construed to prohibit "the publication or disclosure of the name or of the "evidence or any part of the evidence of any witness "who gives evidence at the inquiry, for the purpose of the "prosecution of that witness for any offence under "Chapter XI of the Penal Code."

The commissioner duly held his inquiry, and on April 3, 1943, the commissioner made his report to the Governor.

In light of the claim to privilege, the general nature of the report and the circumstances in which it was produced are of importance. It appears from the report that the commissioner by public advertisement and otherwise made wide appeals to persons who were in possession of relevant information to place that information before him. Despite the immunity given to witnesses by the Ordinance, the public response was small, and of the one hundred and twenty-four witnesses examined only twelve were volunteers. All the evidence was taken in camera. There were made to the commissioner allegations of gratification in respect of matters which came before open council and in respect of matters which came before the executive committee. The chief items in respect of which complaints were made were: (1.) appointments to various offices; (2.) nominations to municipal and urban councils, and (3.) decisions on policy, the repercussions of which resulted in advantage or disadvantage to private parties.

The commissioner states in his report (para. 16) that suggestions were made against nineteen councillors. In some cases, he states, the allegations were made on slender material. He found that eight members, whom he was able to identify, had received gratifications. Among that number were three European members who had taken gratifications openly. He also came to the conclusion that there were in all probability four other members whom he had not been able to identify who received gratifications. In other cases he found room for strong suspicion. He stated that there was a widespread belief that the number of councillors who received gratifications was much greater than the number he had found so to do. On consideration of the evidence, the reading of debates in the council and articles in the Press, he had no doubt that this belief was honestly held, but he thought that popular belief was exaggerated. The commissioner in the main body of the report dealt with the broad results of his inquiry, reserving details to appendices. In each appendix he states the witnesses examined on the particular subject-matter, makes his comment, summarizes the evidence and gives his finding.

Among the matters investigated by the commissioner was an affair which he called the "Arrack contract gratification incident," and it is in connexion with his treatment of this affair that the appellant appeared on the scene. The appellant, it should be stated, was, among other activities, engaged in distilling arrack. He complied with the commissioner's request to attend, and his evidence was taken in camera. The arrack incident is dealt with by the commissioner in para. 18 of his report and in Appendix C.

Paragraph 18 and Appendix C were as follows:

" 18. *Arrack Contract gratification incident.*—There was " evidence before me that in 1939 contractors to the Govern- " ment for the supply of arrack decided to pay to the same " four members a sum of about Rs. 2,000 for the purpose of " having their contracts extended without competition from " outside. There is evidence, which I believe, that money " for this purpose was paid to one of the members, now dead, " Mr. C. Batuwantudawe, but there is no evidence that it was " paid by him to the others. I did not for this reason call " upon the members now alive to answer the allegation as it " cannot be held against them that, with regard to this " particular incident, they actually received the money. " This matter is more fully discussed and reasons for my " view given in Appendix C."

" APPENDIX C.

" ALLEGATION OF PAYMENT OF GRATIFICATIONS TO MESSRS. " C. BATUWANTUDAWE, E. W. ABEYGUNASEKERA, E. R. " TAMBIMUTTU AND H. A. GUNASEKERA FOR THE PURPOSE " OF SECURING THEIR SERVICES IN THE EXECUTIVE COM- " MITTEE OF HOME AFFAIRS IN THE MATTER OF THE " EXTENSION OF A GOVERNMENT CONTRACT.

" *Witnesses examined.*—Messrs. M. F. P. Gunaratne, " D. E. Seneviratne, W. F. Wickremasinghe, M. G. Perera, " C. M. Rodrigo and A. J. Siebel.

" *Allegation.*—These witnesses gave evidence with regard " to the alleged payment of gratifications to four Councillors, " Messrs. C. Batuwantudawe, E. W. Abeygunasekera, " E. R. Tambimuttu and H. A. Gunasekera, for the purpose " of securing their services in the Executive Committee of " Home Affairs. Certain contracts held by distillers for the " supply of arrack to Government were due to expire on " April 30, 1939. The allegation was that money was paid " to the councillors mentioned in order to secure their " support to a proposal that the contracts should be extended " without calling for tenders. The proposal itself was put " forward by the Excise Commissioner for reasons which " I need not go into. It was ultimately adopted by Govern- " ment.

" *Finding.*—My finding upon this matter is that without a " doubt a sum of Rs. 2,000 was paid by the distillers to " Mr. Batuwantudawe. The distillers earmarked this sum " for payment to members of the Executive Committee. " They believed that portions of the sum would find their " way to the other Councillors mentioned. One distiller at " least thought that the money would be paid direct to them. " Others received the impression that it would be paid " through Mr. Batuwantudawe. Mr. Batuwantudawe is " now dead and there is no evidence that he distributed " money among the others. I do not think that any direct " payments were made to them.

" *Comment.*—In 1939 there were eight distilling plants in " Ceylon, the proprietors of which were supplying arrack to " Government. These suppliers consulted each other in " matters of common interest and were loosely associated " with each other as a body without a formal set of rules or " any of the other formalities adopted by Associations " proper. They regarded Mr. D. E. Seneviratne, proprietor " of the Diyalagoda Distillery, as Treasurer, and Mr. W. F. " Wickremasinghe, proprietor of the Anvil Distillery, as " Secretary. They collected money from time to time as " occasion required for meeting various expenses.

" Mr. Gunaratne, the owner of Sirilanda Distillery, Kalutara, " stated to me that either Mr. Wickremasinghe or Mr. Seneviratne or both came to see him and asked him for a " contribution towards a fund from which the four Councillors " mentioned were to be paid. Mr. Gunaratne says that " Messrs. Wickremasinghe and Seneviratne (either or both) " mentioned the names of the four Councillors and that he " paid Rs. 500. There is no doubt about this payment. " The only question is what the conversation was. Messrs. " Seneviratne and Wickremasinghe deny that they mentioned " the four names in the explicit manner deposed to by " Mr. Gunaratne. After carefully weighing up the evidence " I feel that none of these witnesses is deliberately stating an " untruth. Mr. Gunaratne says that he was told by Messrs. " Wickremasinghe and Seneviratne that Mr. Batuwantudawe was the go-between between them and the other " members. Mr. Seneviratne states that he paid Rs. 2,000 " Mr. Batuwantudawe but that he paid no money to any of " the other Councillors. It is common ground that there " were informal conferences at which the distillers discussed

" various matters of importance to themselves. It appears " that at these conferences the distillers sat in small groups " for the purpose of informal discussion and that there was " no meeting in the proper sense of that word. Mr. Seneviratne says that the names of the other Councillors were " mentioned at these conferences as persons to whom " Mr. Batuwantudawe would probably have to pay something. " But he says that there was no definite arrangement with " Mr. Batuwantudawe that they should be so paid. " Mr. Wickremasinghe says that Mr. Seneviratne told him " that Rs. 2,000 was paid to Mr. Batuwantudawe and that " Mr. Seneviratne undertook to obtain the votes of the four " Councillors mentioned through Mr. Batuwantudawe. He " also states that at the time it was common talk that these " four members took bribes. The clear impression which " I have formed is that as a result of the general talk that " these four members took bribes their names were mentioned at conferences and discussions, that the manner of " approach to them, if agreed upon at all, was not agreed " upon with any degree of precision but that the distillers " believed that the money would reach them. I believe " that Mr. Seneviratne is speaking the truth when he says " he paid Rs. 2,000 to Mr. Batuwantudawe and that it is " also true that neither he nor Mr. Wickremasinghe nor " anyone else paid any money direct to the other Councillors.

" Dr. M. G. Perera, who gave evidence, was completely " lacking in frankess and pretended that he knew very much " less about the transaction than he actually did.

" Mr. C. M. Rodrigo, the other witness referred to above, " was a clerk of Mr. Gunaratne and was able to speak only " to the conferences and not to anything that took place " at them.

" Mr. Siebel was merely an officer of a bank producing " certain cheques before me.

L. M. D. de Silva.

" April 3, 1943."

The Governor having received the report caused the report to be printed as a Sessional Paper. The instructions given to the Government printer were that it should not appear before the publication of a Government Gazette Extraordinary which was to contain a Bill to be introduced into the State Council connected with the report. Those instructions were carried out, and simultaneously with the publication of the report on May 19, 1943, there was published in the Gazette the text of a Bill enabling the State Council to expel any member on the ground of the acceptance of a pecuniary reward or other gratification in connexion with the performance of his duties as a member. Two hundred and twelve copies of the report were published for circulation, two hundred and fifty for sale to the public and twenty for the commissioner. The two hundred and fifty available to the public were quickly sold at the Public Record Office. Two hundred and twenty-five reprints were immediately asked for and they became available on May 24. They, too, it appears, were also quickly sold. The practice in Ceylon is that Government Sessional Papers are issued free of charge to the Press. That practice was followed in the present case, and the Sessional Paper was sent to the *Ceylon Daily News* among other newspapers. In the office of the *Ceylon Daily News* the view was taken that the report was a matter of public interest. Practically the whole of the report was published. Only those portions were omitted which in the opinion of the associate editor were not of public interest, or which had been sufficiently covered by other portions of the report which were published. The commissioner was quoted verbatim. Included in the matter published was the whole of para. 18 exactly as it appeared in the report, with an immaterial alteration in the heading, and the whole of Appendix C except the first and the last two paragraphs. Some immaterial cross-headings were inserted and two sentences (neither affecting the appellant) were printed in bold type. The publication of the report began on May 18, 1943, and ended on May 25, 1943, para. 18 appearing on May 20 and Appendix C on May 25. The newspaper did not make any comments of its own. The appellant forthwith instituted these proceedings.

At the trial there appears to have been some confusion on the issue of justification. Some observations by the appellant's counsel, as recorded in the judge's notes, rather support the view that he admitted the peccant statement to be true. No evidence was called directed to prove the truth of the statement. The District Judge, however, did not, in his judgment, rely on any admission of counsel as to truth, and decided that, in the absence of evidence to the contrary, there was a presumption that the findings of the commissioner were true and correct. He accordingly held that what the respondents published was true in substance and in fact, but

J. C.

1948

PERERA (M. G.) v. PEIRIS.

he took the view that the publication by the respondents was not for the public benefit. In the Supreme Court, to which the appellant appealed, his counsel did not query the finding of the District Judge that the words were true in substance and in fact and appears, so far as the issue of justification is concerned, to have dealt only with the question whether the publication was for the public benefit. The Supreme Court answered this question in the affirmative.

The Supreme Court were clearly entitled to determine the case on the footing of the truth of the statement conceded by the appellant's counsel at the hearing before them. But a determination of the matter at issue on the ground of justification is obviously not satisfactory, for the District Judge's reasons for arriving at a decision that truth was proved are plainly wrong, and the reasons for the concession made by the appellant's counsel in the Supreme Court are not apparent. Their Lordships, having arrived at the conclusion that the respondents are entitled to succeed on other grounds, do not propose to deal further with the issue of justification. They will assume the statement as to the appellant's conduct as a witness not to accord with the fact. Fair comment does not therefore arise for consideration and the only question is whether the publication was made on a privileged occasion, the absence of express malice being conceded. On the question of privilege the District Judge took the view that any privilege which might attach to the publication of the report in the newspaper did not extend to the matter published as regards the appellant, as it was foreign to the duty which the newspaper owed to the public. The Supreme Court held that this publication was privileged. Their Lordships will now turn to consider whether this view is or is not correct.

In Roman-Dutch law animus injuriandi is an essential element in proceedings for defamation. Where the words used are defamatory of the complainant, the burden of negativing animus injuriandi rests on the defendant. The course of development of Roman-Dutch law in Ceylon has, put broadly, been to recognize as defences those matters which under the inapt name of privilege and the apt name of fair comment have in the course of the history of the common law come to be recognized as affording defences to proceedings for defamation. But it must be emphasized that those defences or, more accurately, the principles which underlie them, find their technical setting in Roman-Dutch law as matters relevant to negativing animus injuriandi. In that setting they are perhaps capable of a wider scope than that accorded to them by the common law. Decisions under the common law are, indeed, of the greatest value in exemplifying the principles but do not necessarily mark out rules under the Roman-Dutch law. The " gladsome light of Roman jurisprudence " once shone on the common law: repayment to the successor of the Roman law should not take the form of obscuring one of its leading principles. Their Lordships' attention has not been drawn to any case under the Roman-Dutch law or the common law which exactly covers the point at issue. Both systems accord privilege to fair reports of judicial proceedings and of proceedings in the nature of judicial proceedings and to fair reports of parliamentary proceedings, and much time might be spent in an inquiry whether the proceedings before the commissioner fell within one or other of these categories. Their Lordships do not propose to enter on that inquiry. They prefer to relate their conclusions to the wide general principle which underlies the defence of privilege in all its aspects rather than to debate the question whether the case falls within some specific category. The wide general principle was stated by their Lordships in *Macintosh* v. *Dun* (1) to be the " common convenience and " welfare of society " or " the general interest of society," and other statements to much the same effect are to be found in *Stuart* v. *Bell* (2) and in earlier cases, most of which will be found collected in Mr. Spencer Bower's valuable work on Actionable Defamation. In the case of reports of judicial and parliamentary proceedings the basis of the privilege is not the circumstance that the proceedings reported are judicial or parliamentary—viewed as isolated facts—but that it is in the public interest that all such proceedings should be fairly reported. As regards reports of judicial proceedings reference may be made to *Rex* v. *Wright*(3) where the basis of the privilege is expressed to be " the general advantage to the country in " having these proceedings made public," and to *Davison* v. *Duncan* (4), where the phrase used is " the balance of public " benefit from publicity " ; while in *Wason* v. *Walter* (5) the privilege accorded to fair reports of parliamentary proceedings was put on the same basis as the privilege accorded to fair reports of judicial proceedings — the requirements of the public interest.

(1) [1908] A. C. 390.
(2) [1891] 2 Q. B. 341.
(3) (1799) 8 T. R. 293, 298.
(4) (1857) 7 E. & B. 229, 231.
(5) (1868) L. R. 4 Q. B. 73.

Reports of judicial and parliamentary proceedings and, it may be, of some bodies which are neither judicial nor parliamentary in character, stand in a class apart by reason that the nature of their activities is treated as conclusively establishing that the public interest is forwarded by publication of reports of their proceedings. As regards reports of proceedings of other bodies, the status of those bodies taken alone is not conclusive and it is necessary to consider the subject-matter dealt with in the particular report with which the court is concerned. If it appears that it is to the public interest that the particular report should be published privilege will attach. If malice in the publication is not present and the public interest is served by the publication, the publication of the report must be taken for the purposes of Roman-Dutch law as being in truth directed to serving that interest. Animus injuriandi is negatived.

On a review of the facts their Lordships are of opinion that the public interest of Ceylon demanded that the contents of the report should be widely communicated to the public. The report dealt with a grave matter affecting the public at large, namely, the integrity of members of the Executive Council of Ceylon, some of whom were found by the commissioner improperly to have accepted gratifications. It contained the reasoned conclusions of a commissioner who, acting under statutory authority, had held an inquiry and based his conclusions on evidence which he had searched for and sifted. It had, before publication in the newspaper, been presented to the Governor, printed as a Sessional Paper and made available to the public by the Governor contemporaneously with a Bill which was based on the report and which was to be considered by the Executive Council. The due administration of the affairs of Ceylon required that this report in light of its origin, contents and relevance to the conduct of the affairs of Ceylon and the course of legislation should receive the widest publicity. As regards the newspaper, the report was sent to it by the authorities in the ordinary course. Nothing turns on any implied request to publish—that would, in their Lordships' opinion, be relevant only if malice were in issue. Their Lordships take the view that the respondents as respects publication stand in no better and no worse position than any other person or body in Ceylon. A newspaper as such has in the matter under consideration no special immunity. But it would be curious to hold that either the editor or the proprietor of the newspaper was disqualified by the nature of his activities from having the same interest in the public affairs of Ceylon as that proper to be possessed by the ordinary citizen. In their Lordships' view the proprietor and printer of the newspaper and the public had a common interest in the contents of the report and in its wide dissemination. The subject-matter created that common interest. To this it may, perhaps irrelevantly in law, be added that the ordinary member of the community of Ceylon would indeed conceive it to be part of the duty of a public newspaper in the circumstances to furnish at least a proper account of the substance of the report. Taking that view of the facts of the case, and applying the general principle their Lordships have stated, their Lordships are of the opinion that the immunity afforded by privilege attached to the publication by the respondents of this report considered as a whole.

It remains to deal with two further matters. First, it was argued that assuming that the report was published by the defendants on a privileged occasion the report was divisible and that the statement relating to the appellant's conduct as a witness was not referable to any matter on which the privilege was founded. Malice, it will be recalled, was not alleged. Their Lordships cannot accept this contention. The main matter of public interest was the question of the extent to which members of the executive council had accepted bribes, and, linked up with that, the value which might properly be attributed to the report as one which covered the whole ground. No just estimation of the general position as to bribery or as to the value of the report could be formed without knowledge of the grounds on which the commissioner stated he had acted and of the difficulties which the commissioner stated he had encountered in coming, or in failing to come, to a conclusion on particular topics, to a definite conclusion. Their Lordships have recited the facts which bear on the lines on which the report was framed. It is, in their Lordships' view, clear that the statement as to the appellant was germane and appropriate to the occasion and does not fall to be distinguished in any degree from the other contents of the report. Their Lordships would add that a view corresponding to that entertained by their Lordships here was expressed by Cockburn C.J. in *Cox* v. *Feeney* (1).

Second, it was argued that the publication of the matter complained of was illegal in that it constituted a breach of

(1) 4 F. & F. 13.

s. 6, sub-s. 1, of the Special Ordinance and that therefore a defence based on privilege must fail. In their Lordships' opinion the publication was not a breach of that section. On this point they agree with the view of the Supreme Court as expressed by the learned Chief Justice when he said: "In "my opinion publication is not prohibited of the name, but of "'the name and the evidence or any part of the evidence.' "The name and the evidence or any part of the evidence has "not been published." It is true that s. 6, sub-s. 2, and s. 10 (*b*) both say: ". . . . of the name *or* of the evidence . . . ." but this use of the disjunctive accords with the saving or qualifying nature of these provisions and in no way conflicts with the conjunctive form of the prohibition enacted by s. 6, sub-s. 1. Their Lordships can see nothing in the other terms of the Ordinance to justify any modification of the natural meaning of the words of that sub-section: ". . . . the name "*and* the evidence or any part of the evidence . . . ." On the contrary, it may well be said that the context points away from a disjunctive construction, for s. 6, sub-s. 1, clearly relates only to evidence which is heard in camera and if, as s. 5 contemplates, but part of a witness's evidence was so heard, that construction would have the strange effect of forbidding the disclosure of the witness's name while allowing publication of part of his testimony.

In the circumstances their Lordships will humbly advise His Majesty that the appeal be dismissed. The appellant will pay the costs of the appeal.

Solicitors for appellant: *Burchells.*
Solicitors for respondents: *Darley, Cumberland & Co.*

J. C.*

1948

Oct. 13.

[PRIVY COUNCIL]

D. R. FRASER AND COMPANY, LIMITED Appellant;

AND

MINISTER OF NATIONAL REVENUE . Respondent.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada — Revenue — Income tax — Timber limits — Exhaustion allowance — Discretion of Minister — Income War Tax Act, R. S. C. 1927, *c.* 97 (*as amended by s.* 10 *of c.* 34 *of S. C.* 1940), *s.* 5, *sub-s.* 1 (*a*)—*Construction.*

The provision in s. 5, sub-s. 1 (*a*), of the Dominion Income War Tax Act, R. S. C. 1927, c. 97, as amended by s. 10 of c. 34 of S. C. 1940, that the Minister may make under the head of " depletion " " such an allowance for the exhaustion of the . . . . timber " limits as he may deem just and fair," confers on him a discretion to determine whether the case before him is one for making any allowance at all and does not limit his discretion to determining the extent of the allowance to be made. The language is permissive not obligatory, and he has a double discretion, first, to determine whether the case is one for an allowance, and second, if so, to determine how much shall be allowed. The Minister was accordingly under no legal obligation to make a depletion allowance to the appellant company, in respect of their assessment to income tax for the fiscal year 1940–41, for the exhaustion of timber limits owned by the Crown on which the appellant company had been licensed to cut timber.

In exercising his discretion not to make any depletion allowance the Minister was entitled to take into consideration, as he did, the fact that the appellant company had already in past years received allowances to the extent of 100 per cent. in respect of the sum which they had paid for their licences to cut and acquire the timber, which sum, since the timber being exhausted belonged to the Crown, was the only capital asset of the company which was in process of wasting as the cutting proceeded, and the Minister could not be said to have transgressed the bounds of his discretion so as to justify any interference with his decision.

Judgment of the Supreme Court of Canada [1947] S. C. R. 157, affirmed.

Appeal (No. 51 of 1947), by special leave, from a judgment of the Supreme Court of Canada (February 4, 1947) which dismissed the appellant's appeal from a judgment of the Exchequer Court of Canada (December 20, 1945).

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* *Present:* Viscount Simon, Lord Macmillan, Lord Simonds, Lord Oaksey and Lord MacDermott.

The following facts are taken from the judgment of the Judicial Committee. In the fiscal year 1940–41 the appellant company, in pursuance of their business as lumbermen, held three Government licences under which they cut timber in three areas of Crown land in the Province of Alberta. In making their income tax return for the year they deducted a sum which they claimed as an allowance for depletion of the timber included in their licences at the rate of $1.40 per thousand feet of timber cut. To that deduction they claimed that they were entitled under s. 5, sub-s. 1 (*a*), of the Dominion Income War Tax Act, R. S. C. 1927, c. 97, which, as amended by s. 10 of c. 34, 1940, read as follows:

> "5. (1.) 'Income' as hereinbefore defined shall for the "purposes of this Act be subject to the following exemptions "and deductions:
>
> "(*a*) The Minister in determining the income derived "from mining and from oil and gas wells and timber "limits may make such an allowance for the exhaustion "of the mines, wells and timber limits as he may deem "just and fair, and in the case of leases of mines, oil and "gas wells and timber limits the lessor and lessee shall "each be entitled to deduct a part of the allowance for "exhaustion as they agree, and in case the lessor and "lessee do not agree the Minister shall have full power to "apportion the deduction between them and his determination shall be conclusive."

In the assessment subsequently made on the appellant company the deduction which they claimed was disallowed. They thereupon served a notice of appeal on the respondent, the Minister of National Revenue, in which they set out as the ground of their appeal that under the above-quoted provision of the Income War Tax Act they had a "statutory right" and were "entitled to an allowance for the exhaustion of the "said timber limits," being the areas included in their licences; and that the Minister had "a duty of a quasi-judicial character, "to be exercised on proper legal principles, to fix a just, fair "and reasonable amount as an allowance to the appellant for "the exhaustion of the said timber limits," which duty the Minister had failed to perform.

The Minister affirmed the assessment, stating his decision as follows: "The Honourable the Minister of National Revenue,

J. C.
1948

D. R. FRASER AND CO., LD.
v.
MINISTER OF NATIONAL REVENUE.

"having duly considered the facts as set forth in the notice of "appeal and matters thereto relating, hereby affirms the said "assessment on the ground that the taxpayer is not entitled to "an allowance under the provisions of sub-s. (*a*) of s. 5 of the "Income War Tax Act for the exhaustion of timber limits "owned by the Crown in right of the Province of Alberta on "which the taxpayer has been licensed to cut timber. Therefore on these and related grounds and by reason of other "provisions of the Income War Tax Act and Excess Profits "Tax Act the said assessment is affirmed." The appellant company gave notice to the Minister of their dissatisfaction with his decision and of their desire that their appeal be set down for trial. In an accompanying statement of particulars they repeated their contention that they had a statutory right to a deduction for depletion. The Minister replied denying the appellant company's allegations and reaffirming the assessment. The documents were thereupon transmitted to the Exchequer Court at Edmonton and the matter was under the statute deemed to be an action in the court ready for trial or hearing. An order for formal pleadings was pronounced. The appellant company lodged an amended statement of claim, in which they reasserted their statutory right to a deduction. The Minister lodged a statement of defence denying the right claimed and further submitting that the appellant company had no proprietary or other depletable interest in the timber limits, that they were not lessees within the meaning of the Act but were simply purchasers of the timber, and that the cost of the timber in the year in question had been allowed as a deduction in determining the profits subject to tax.

The case having come on for hearing before His Honour Judge Cameron both parties were allowed to amend their pleadings. The Minister's amendment, to which no objection was taken, consisted in adding to his statement of defence the following paragraph: "17. That in the years prior to the "taxation year 1941 the Minister has allowed to the appellant "amounts for exhaustion which have enabled the appellant to "recover, free of income tax, its entire cost of any timber "licences or permits held by it, and in making the said "allowances the Minister has exercised the discretionary power "vested in him by the provisions of s. 5, sub-s. 1 (*a*), of the "Income War Tax Act." No evidence was led at the trial on behalf of the Minister, but each party put in evidence extracts from testimony given on examination for discovery

J. C.
1948
D. R. FRASER AND CO., LD. v. MINISTER OF NATIONAL REVENUE.

by Mr. C. Fraser Elliott, the Deputy Minister, who, as the duly authorized delegate of the Minister, had made the decision impugned. Several witnesses were called and gave evidence on behalf of the appellant company. In the extract from the evidence of Mr. Elliott on discovery put in by the appellant company the following passage occurs in his examination on behalf of the company:

" Q. Mr. Elliott, in exercising your discretion here you " have taken the position that the appellant is not entitled " to an allowance under the provisions of s. 5 (*a*) for the " exhaustion of timber limits, I take it because the timber " limits are owned by the Crown and the appellant has only " been licensed to cut the timber ?

" A. Because he has only a licence.

" Q. And that is your sole objection to the allowance, " I take it ?

" A. That is right."

In another passage, put in evidence on behalf of the Minister, Mr. Elliott in cross-examination explained that his disallowance of the deduction claimed was based not only on his conception of the legal position of the appellant company in relation to their timber limits but also on the view that they had been allowed as expenses " all expenditures incurred in securing " the timber " and had " made no capital investment which we " feel required depletion."

His Honour Judge Cameron, on December 20, 1945, dismissed the appeal, holding that the Minister on a sound interpretation of the statute had " a discretionary power, after considering " all the facts, to grant or withhold any allowance " and that the Minister had " exercised that discretion according to proper " legal principles." The appellant company then appealed to the Supreme Court of Canada (Kerwin, Taschereau, Rand and Estey JJ.) which unanimously affirmed the judgment of the Exchequer Court and dismissed the appeal.

1948. July 5, 6, 7. *S. Bruce Smith K.C.* (of the Canadian Bar) and *Gahan* for the appellant. This is a test case. The Minister held that the appellant company was not entitled to the deduction because it had no real ownership in the timber, which belonged to the Crown, and that this matter of ownership was sufficient to support the decision ; that the matter was discretionary and that the position was that the appellant could not get an allowance because cost in full had already been allowed to it. It is submitted, first, that under s. 5, sub-s. 1 (*a*), the appellant company has a statutory right to an allowance for exhaustion, and secondly, that the Minister's discretion is limited to amount only. [The legal position before there were allowances to the so-called extractive industries was then examined, and reference made to *Coltness Iron Co.* v. *Black* (1) and *Kauri Timber Co., Ld.* v. *Commissioner of Taxes* (2).] An allowance for exhaustion, for which provision had been made in earlier statutes, was continued in s. 5, sub-s. 1 (*a*), of c. 97 of the R. S. C. 1927. By the amendment of that section by s. 10 of c. 34 of the S. C., 1940, the word "shall" was changed to "may," but otherwise the section was left in a form which, for all practical purposes, was identical with that which was interpreted by the Judicial Committee in *Pioneer Laundry and Dry Cleaners, Ld.* v. *Minister of National Revenue* (3), and on the authority of the decision in that case the taxpayer has a statutory right to an allowance for exhaustion. [Reference was made to *Spooner* v. *Minister of National Revenue* (4), *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (5) and *Barras* v. *Aberdeen Steam Trawling & Fishing Co.* (6), where it was said that "where the "language of a statute has received judicial interpretation, "and Parliament again employs the same language in a "subsequent statute dealing with the same subject-matter, "there is a presumption that . . . . the language so used ". . . . should be given the meaning which meantime has "been judicially attributed to it."] By the amendment of s. 5, sub-s. 1 (*a*), Parliament did not make the *Pioneer Laundry* case (7) inapplicable, but adopted the principle of that case. *Minister of National Revenue* v. *Wrights' Canadian Ropes, Ld.* (8) deals with the question whether the Minister must state his reasons for the action he takes: in accordance with that case either the decision of the Minister here was arbitrary because he had not the facts before him, or, if he had, he did not take them into account. There is no such proviso in s. 5, sub-s. 1 (*a*), as is in the American statute dealt with in *Lynch* v. *Alworth-Stephens Co.* (9) and *United States* v. *Charles A. Ludey* (10), and the appellant here is entitled either to an allowance for the exhaustion of the asset being extracted, or to a return of the capital on the waste theory of capital, the capital being the assets of the company, the timber, and not the dollars invested in those assets. [Reference was also made to *Galloway* v. *Schill, Seebohm & Co., Ld.* (1).]

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(1) (1881) 6 App. Cas. 315, 338.
(2) [1913] A. C. 771, 777, 780.
(3) [1940] A. C. 127, 135, 137.
(4) [1931] S. C. R. (Can.) 399, 404–5.
(5) [1891] A. C. 531, 590–1.
(6) [1933] A. C. 402, 446.
(7) [1940] A. C. 127.
(8) [1947] A. C. 109.
(9) (1924) 267 U. S. 365, 367, 369.
(10) (1926) 274 U. S. 295, 303.

The allowances previously made to the appellant were clearly on the evidence made as expenses " wholly, exclusively and " necessarily laid out or expended for the purpose of earning " the income," and such allowances are not properly to be considered in dealing with an exhaustion allowance. In holding that the Minister may refuse an exhaustion allowance because costs have been recovered as expense, the judges below misconceived the intent and purpose of the section, which is either (*a*) to ensure that the taxpayer be allowed to recover tax-free a just and reasonable allowance unrelated to cost for the exhaustion of the timber limits or other wasting asset being worked, or (*b*) compensation to the operator of the industry for the extraordinary hazard undertaken therein: the evidence established the fact of exhaustion of the appellant's timber limits and the very great hazard from fire and other perils. The interests of the owners of timber limits and of the owners of coal mines and of pulp limits are all profits à prendre giving the right to win timber or coal, as the case may be, and since exhaustion allowances unrelated to costs have over many years been granted to all such owners except those of timber, the Minister has by the administrative practice of his department placed an interpretation on the section which the appellant is entitled to have applied in its assessment to tax. Under s. 5, sub-s. 1 (*a*), there should be reasonable equality of treatment, but the Minister has discriminated between taxpayers deriving income from oil and gas wells and timber limits used for pulpwood and taxpayers deriving income from other timber limits, and he is not entitled so to do. The allowance claimed by the appellant in its return is a just and fair one, and as a matter of construction the Minister has exercised his discretion on the wrong principle.

R. P. Morison and *B. MacKenna* for the respondent. The main propositions advanced for the appellant were, first, that it has a statutory right to an allowance for exhaustion of the timber by reason of s. 5, sub-s. 1 (*a*), and secondly, that the Minister's discretion is as to amount only, and that in exercising that discretion he must make an allowance for exhaustion which is unrelated to the cost of the timber to the appellant.

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(1) [1912] 2 K. B. 354, 356, 359.

J. C.
1948
D. R. FRASER AND CO., LD.
v.
MINISTER OF NATIONAL REVENUE.

If those two propositions are unsound as a matter of law this appeal must fail, and both are challenged. Whether they are sound or not must be determined as a matter of construction on s. 5 of the Act alone. Taking the first proposition, it is submitted that the appellant has no right to any allowance if the Minister in the exercise of his discretion—and for this purpose it is assumed that it is properly exercised—determines in any particular case that an allowance shall not be made. There is a discretion to determine whether or not an allowance shall be made as well as to determine the amount in any case where it falls to be made. The argument for the appellant in support of the proposition that it had a statutory right to an allowance appears to have been based almost entirely on the *Pioneer Laundry* case (1), but in the first place attention must be drawn to the difference of wording of s. 5 in that case, before it was amended. In that case it was held that the section gave the taxpayer a right to an amount for depreciation, and the only discretion committed to the Minister was to fix the proper amount. Attention is further drawn to the fact that in relation to extractive industries the statutory language in the old s. 5 was imperative. The present s. 5 is in marked contrast, and the words " the Minister . . . . may make such " an allowance " plainly give him a discretion not only as to amount, but as to both amount and right, and he is quite entitled, in the proper exercise of his discretion, to determine that no allowance shall be given at all. The Interpretation Act, R. S. C. 1927, c. 1, s. 37 (24.), specifically says that " may " is to be construed as permissive, and there is no context here which indicates that " may " should be read otherwise.

The Minister having made no allowance, the next question is whether the appellant has shown sufficient ground for an interference with the Minister's discretion. *Wrights' Canadian Ropes* case (2) established in the first place that it is for the taxpayer to show ground for interfering with the discretion. This Board will not interfere with the discretion of the Minister unless it is established that it is manifestly against some fundamental principle. It is not sufficient to show that this Board might, or, indeed, would have exercised discretion in another way if the matter had originally been within the jurisdiction here: Maxwell on Interpretation of Statutes, 9th ed., pp. 129–30. The next question is, what are the grounds on which the Minister proceeded in refusing an allowance? This case is different from the *Wrights' Canadian Ropes* case (2),

(1) [1940] A. C. 127. (2) [1947] A. C. 109.

where the Minister did not disclose his reasons. The way in which it is put by the appellant is a possible way of making an allowance for the exhaustion, but it is not the only way. In determining the method by which such allowances should be given one is in the region of accountancy rather than of law: *Rex* v. *Port of London Authority. Kynoch, Ld., Ex parte* (1). [The grounds on which the Minister proceeded in refusing the allowance were examined.] They are cumulative, but if any one of them is a good one then the discretion has been properly exercised. The appellant has not established that the Minister failed properly to exercise his discretion. There is no principle laid down in s. 5, sub-s. 1 (*a*), on which the allowance for exhaustion is to be given. In effect, the substantial reasons which the Minister gave for refusing the allowance were that exhaustion was based on cost, that the appellant was not the owner of the timber limits, and had received all the capital outlay and costs of operation and expenses. The Minister was entitled in the exercise of his discretion to view the matter from the point of view of costs and not from that of assets. If it be right that the principle on which an allowance for exhaustion is to be made is a matter of accountancy, and not of law, it cannot possibly be said that the Minister's discretion can be interfered with when he has adopted a legitimate and reasonable method of exercising it.

Allowances granted in other restrictive industries were referred to for the appellant, the argument being that those allowances showed a departmental practice of giving allowances not necessarily based on costs, and secondly, the illustrations were relied on as affording evidence of discrimination between the appellant and those other industries. On this point nothing can be usefully added to the reasons given by Estey J. in the Supreme Court, where he said that the great differences with respect to the operation of the lumber industry in different parts are such as may justify a variation in the allowances, and in the absence of evidence to the contrary it cannot be concluded that the decisions arrived at are either arbitrary or discriminatory.

Gahan replied, and referred to the *Pioneer Laundry* case (2) and *John Hall, Junior & Co.* v. *Rickman* (3).

Oct. 13. The judgment of their Lordships was delivered by LORD MACMILLAN, who stated the facts set out above and continued: Special leave to appeal having been granted to the appellant company by Order in Council, their Lordships have heard the case fully argued and now express the conclusions which they have reached. In both of the courts in Canada there was much argument as to the precise legal position of the appellant company as licensees of their timber limits. The Minister contended that being mere purchasers of the timber which they cut and not being lessees they were not entitled to invoke s. 5, sub-s. 1 (*a*), of the statute and were not eligible for any depletion allowance, so that his discretion to make an allowance was not called into action. Before their Lordships counsel for the Minister abandoned this contention and no more need be said about it. The argument at their Lordships' bar was mainly directed to two questions, (1.) whether under the statute the Minister is bound in law to make a deduction for depletion in determining the income derived from the enumerated classes of undertakings and has a discretion only as to the amount to be allowed; or whether he has a discretion not limited to the amount of the allowance but entitling him to refuse to make any allowance at all; and (2.) whether on either view the Minister in the present case validly exercised his discretion.

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(1) [1919] 1 K. B. 176, 184–5.
(2) [1940] A. C. 127, 137.
(3) [1906] 1 K. B. 311, 316.

(1.) Taking the statute as it stands, their Lordships are of opinion that the section in providing that the Minister *may* make under the head of "depletion" such an allowance for exhaustion of timber limits as he *may* deem just and fair, plainly confers on the Minister a discretion to determine whether the case before him is one for making any allowance at all and does not limit his discretion to determining the extent of the allowance to be made. He has a double discretion, first, to determine whether the case is one for an allowance, and second, if so, to determine how much shall be allowed. The Minister "may" not "shall" make an allowance. The language is permissive, not obligatory. The Dominion Interpretation Act, R. S. C., 1927, c. 1, s. 37, provides that "in every Act, "unless the context otherwise requires . . . . (24.) 'shall' "is to be construed as imperative, and 'may' as permissive." It was suggested that the opening words of s. 5 of the Income War Tax Act—"Income . . . . *shall* for the purposes of this "Act be subject to the following exemptions and deductions" supplied a context which required "may" in head (*a*) to be read in an obligatory sense. But these opening words merely require the Minister to make a deduction under head (*a*) if he has decided that the case is one for a deduction. They cover a whole series of heads from (*a*) to (*o*), some of which prescribe automatic deductions and others deductions involving the exercise of the Minister's discretion. Reference was also made to the words in the latter part of head (*a*) providing that in the case of leases "the lessor and lessee shall each be entitled to "deduct a part of the allowance for exhaustion as they agree, "and in case the lessor and lessee do not agree the Minister "shall have full power to apportion the deduction between "them," and it was suggested that this implied that there must be a deduction, otherwise there would be nothing to apportion. But all that is meant is that if the Minister allows a deduction then it shall be apportionable between lessor and lessee.

So far their Lordships have considered the language of the statute as it at present stands. But their reading of it is strongly reinforced by the history of the enactment. In the statute as originally framed s. 5, sub-s. 1, provided for the deduction under head (*a*) of "Such reasonable amount as the "Minister in his discretion may allow for depreciation, and the "Minister in determining the income derived from mining and "from oil and gas wells and timber limits *shall* make such an "allowance for the exhaustion of the mines, wells and timber "limits as he may deem just and fair." Here depreciation and exhaustion are included under the same head, and as regards exhaustion it is provided that the Minister *shall* make such an allowance as he may deem just and fair. In *Pioneer Laundry and Dry Cleaners, Ld.* v. *Minister of National Revenue* (1), which related to a claim for depreciation, the board held that the appellants were entitled to a deduction for depreciation to such extent as the Minister might allow, and that the Minister had not properly exercised his discretion inasmuch as he had had regard to inadmissible considerations. It was after this decision that the statute was amended. Depreciation was transferred for treatment to s. 6, which was amended so as to provide that no deduction should be allowed for depreciation except such amount as the Minister in his discretion might allow; and in the provision of s. 5 relating to depletion or exhaustion "may" was substituted for "shall." The contrast is pointed. When an amending Act alters the language of the principal statute, the alteration must be taken to have been made deliberately. In tax legislation it is far from uncommon to find amendments introduced at the instance of the revenue department to obviate judicial decisions which the department considers to be attended with undesirable results. The Minister, in their Lordships' opinion, was accordingly not under any legal obligation to make a depletion allowance in the case of the appellant company.

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(1) [1940] A. C. 127.

(2.) There remains the question whether the Minister, in exercising his discretion as to whether he should or should not make a depletion allowance in the present case and deciding not to do so proceeded on just, reasonable and admissible grounds. To deal with this question it is necessary to explain in some detail the facts which were before the Minister. Of the three licences operated by the appellant company two had been granted originally by the Dominion Government while the third had been granted by the Provincial Government after the transfer of certain natural resources from the Dominion Government to the Government of Alberta. The first two had been renewed successively by the Dominion and by the Provincial Governments from year to year and the third had been annually renewed by the Provincial Government. In the case of the two original Dominion grants the licensee was required to pay down a lump sum or bonus in addition to the rent and other dues payable under the licence. This sum was not repayable to the licensee. In the case of the Provincial grant no lump sum or bonus was payable by the licensee but he was required to deposit a sum as security for the payment of dues, and this sum, so far as not applied to the payment of dues, was repayable to the licensee. The only irrecoverable capital outlay by the appellant company or their predecessors in acquiring right to cut the timber in the three areas thus consisted of the two sums paid to the Dominion Government on the grant of the first two licences. In each year up to 1939 the appellant company in computing their income for tax purposes had deducted as an expense part of the sums paid to the Dominion Government for the first two licences and this deduction had been allowed. By 1939 those successive deductions amounted in total to the whole sums originally paid to the Dominion Government. The view of the Minister in the exercise of his discretion was that this circumstance afforded a fair and proper reason for not making any further allowance for depletion or exhaustion, having regard to the fact that the appellant company were not the owners of the land or of the timber thereon which was in process of being exhausted. For the appellant company it was contended that it was wrong in principle to have regard to the capital cost of obtaining the right to cut and carry away the timber and that under the statute the Minister's duty was to consider what was a just and reasonable allowance for the progressive exhaustion of the timber on their limits without relation to what the company had paid for the right to cut and acquire it.

It was argued that the Minister in originally intimating his decision had, in effect, stated that he based it on the ground that the appellant company as licensees were not as such entitled under the statute to any allowance for depletion of timber limits which belonged to the Crown, and in this connexion reference was made to the evidence of Mr. Elliott, quoted above. This, it was said, showed that the Minister had misdirected himself in exercising his discretion, and it was contended that he was not entitled subsequently to justify the exercise of his discretion by adducing reasons not present to his mind when he gave his decision. But in his decision the Minister relied on other "related grounds," and Mr. Elliott in later passages of his evidence qualified and explained what he had said in the quoted passage, while in the amendment of his statement of defence allowed by the court the Minister amplified and made clear his grounds for the disallowance. Moreover, in a letter to the legal advisers of the appellant company before the decision was given Mr. Elliott had taken the point that their clients had already received allowances or deductions to the extent of the capital sum which they had paid for their licences. It was thus made abundantly clear in the course of the proceedings that the Minister in exercising his discretion proceeded on the view that what was being exhausted was the timber belonging to the Crown which the appellant company were licensed to cut and acquire, and that the only allowance for depletion which ought properly to be made in favour of the appellant company was in respect of the sum which they had paid for the privilege of cutting and acquiring the timber; this was the only capital asset of the appellant company which was in process of wasting as the cutting proceeded; and for such depletion the appellant company had already received allowances in past years to the extent of 100 per cent.

In their Lordships' opinion the Minister was entitled in exercising his discretion to proceed on this view of the circumstances. It was an intelligible view which was both tenable

J. C.
1948
D. R. Fraser and Co., Ld. v. Minister of National Revenue.

and admissible, and in adopting it the Minister cannot be said to have transgressed the bounds of his discretion so as to justify any interference with his decision. The criteria by which the exercise of a statutory discretion must be judged have been defined in many authoritative cases, and it is well settled that if the discretion has been exercised bona fide, uninfluenced by irrelevant considerations and not arbitrarily or illegally, no court is entitled to interfere even if the court, had the discretion been theirs, might have exercised it otherwise. The appellant company would gain no advantage by a remitting of their claim to the Minister for a fresh exercise of his discretion, for he would doubtless only repeat his decision with a more explicit statement of the grounds on which it is now clear that he originally proceeded and on which, in their Lordships' opinion, he was entitled in his discretion to proceed. An attempt was made in the courts in Canada to show that the Minister had unfairly discriminated against the appellant company in view of the allowances which he had given in the case of other undertakings elsewhere, but this plea completely failed and was not pursued before their Lordships.

Having thus disposed of all the matters raised on behalf of the appellant company, their Lordships will accordingly humbly advise His Majesty that the appeal be dismissed and the judgment of the Supreme Court of Canada of February 4, 1947, be affirmed. The appellant company will pay the respondent's costs of the appeal.

Solicitors for appellant: *Blake & Redden.*
Solicitors for respondent: *Charles Russell & Co.*

[PRIVY COUNCIL]

J. C.*
1948
Oct. 19.

INTERNATIONAL HARVESTER COMPANY OF CANADA, LIMITED APPELLANT;

AND

PROVINCIAL TAX COMMISSION AND OTHERS . . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA

Canada — Saskatchewan — Revenue — Income tax — Non-resident manufacturing company—Profits from sales business in Saskat-

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* *Present:* Lord Porter, Lord Simonds, Lord Oaksey, Lord Morton of Henryton and Lord MacDermott.

chewan—Exclusion of proportion of profit attributable to manufacturing operations outside the province—Income Tax Act, 1932, *St. Sask., c.* 9, *s.* 7, *sub-s.* 4; *s.* 21*a—Income Tax Act,* 1936, *St. Sask., c.* 15, *s.* 23*—Regulations issued pursuant to s.* 7, *sub-s.* 4, *of Income Tax Act,* 1932, *reg.* 3.

By s. 21*a* of the Income Tax Act, 1932, of Saskatchewan, as amended, which is in the same terms as s. 23 of the Income Tax Act of Saskatchewan of 1936: " The income liable to taxation " under this Act of every person residing outside of Saskatchewan " who is carrying on business in Saskatchewan, either directly or " through or in the name of any other person, shall be the net profit " or gain arising from the business of such person in Saskatchewan."

The appellant company, incorporated under the Companies Act of Ontario, with its head office in Hamilton, Ontario, was for income tax purposes resident outside of Saskatchewan. Its business was that of manufacturing and selling agricultural implements, the manufacturing operations being carried on entirely outside the province of Saskatchewan, and the selling operations partly in that province and partly in other provinces and countries. The selling business in Saskatchewan was carried on at branch offices, all moneys received by the appellant in Saskatchewan being deposited in separate bank accounts and remitted in full to the head office, which sent to the Saskatchewan branches such moneys as were required for operating and incidental expenses.

Held, that any part of the appellant's net profit which might fairly be attributed to its manufacturing operations outside the province of Saskatchewan was not profit arising from the business of the appellant in Saskatchewan within the meaning of s. 21*a* of the Income Tax Act, 1932, as amended, and must be excluded in ascertaining the income of the appellant liable to taxation under that section. So to construe s. 21*a* gave effect to the general scheme of taxation set out in the Act.

Dictum of Duff C.J. approved where he said that " It is not the " profits received in Saskatchewan that are taxable; it is the profits " arising from its business in Saskatchewan, not the profits arising " from the company's manufacturing business in Ontario and from " the company's operations in Saskatchewan taken together, but " the profits arising from the company's operations in Saskatchewan."

Commissioners of Taxation v. *Kirk* [1900] A. C. 588, referred to.

The facts brought the present case within the terms of s. 7, sub-s. 4, of the Act of 1932, as the appellant's system of keeping accounts during the three periods in question—the taxation years 1934 and 1935, and the period of ten months ended October 31, 1936—resulted in the commissioner being " unable to determine " . . . . the income within the province " of the appellant without recourse to the regulations made under s. 7, sub-s. 4. Those regulations were intra vires the Lieutenant-Governor and applied to both residents and non-residents. The present case fell within reg. 3, and the commissioner should have carried out the assess-

J. C.
1948
INTERNATIONAL HARVESTER COMPANY OF CANADA, LD.
v.
PROVINCIAL TAX COMMISSION.

ment under that regulation, giving due regard to the question of manufacturing profit.

Judgment of the Supreme Court of Canada [1941] S. C. R. 325, reversed.

APPEAL (No. 12 of 1942), by special leave, from so much of the judgment of the Supreme Court of Canada (April 22, 1941) as was adverse to the appellant, and whereby an appeal by the appellant from the judgment of the Court of Appeal for Saskatchewan (April 2, 1940) was dismissed in part and the cross-appeal of the respondents was dismissed.

The following facts and statutory provisions are taken from the judgment of the Judicial Committee. This appeal related to three assessments of income tax made against the appellant on August 23, 1938, by the Commissioner of Income Tax of the province of Saskatchewan, as follows:

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(*a*) for the taxation year 1934	4,382.07
(*b*) for the taxation year 1935	11,541.07
(*c*) for the period of ten months ended October 31, 1936	10,136.60
Total	$26,059.74

The appellant was a corporation incorporated under the Companies Act of the province of Ontario, having its head office at the city of Hamilton, Ontario. The appellant's business was the manufacture and sale of agricultural implements and parts thereof and business incidental thereto. The manufacturing operations of the appellant were carried on entirely outside the province of Saskatchewan and its selling operations were carried on partly in Saskatchewan and partly in other provinces and countries. The appellant had no directors resident in Saskatchewan, no meetings of its board of directors were held in Saskatchewan, and its central management and control abode at its head office in Hamilton, Ontario. The appellant's selling business in Saskatchewan was carried on at branch offices. All moneys received by the appellant in Saskatchewan were deposited in separate bank accounts and remitted in full to the appellant's said head office, which sent to the Saskatchewan branches such moneys as were required for operating and incidental expenses. On those facts it was common ground that, for income tax purposes, the appellant

J. C.

1948

INTERNATIONAL HARVESTER COMPANY OF CANADA, LD.
v.
PROVINCIAL TAX COMMISSION.

resided outside of Saskatchewan, and that had been assumed in the courts in Canada.

The province of Saskatchewan had no income tax statute till the Income Tax Act, 1932, was passed, applying to incomes earned or received after January 1, 1931. That Act was amended by Acts of 1933, 1934 and 1934–5. In 1936 the Income Tax Act, 1936, was passed, applying to incomes earned or received in the year 1935 or subsequently. That Act was mainly a consolidation of the Act of 1932 and the subsequent amending Acts. Of the three assessments in question on this appeal, the first arose under the 1932 Act, as amended, while the second and third arose under the 1936 Act. It happened, however, that the language of the sections of the 1932 Act (as amended) which were relevant for the present purpose was identical with the language of the corresponding sections of the 1936 Act. For the sake of simplicity, their Lordships would refer by their numbers to the sections of the 1932 Act as amended, without specifying the numbers of the corresponding sections of the 1936 Act. In order that the questions arising on this appeal may be fully and accurately stated it will be necessary to set out a number of the relevant sections, and to quote in full certain regulations purporting to have been made under s. 7, sub-s. 4, of the 1932 Act; but as the main controversy centred on s. 21*a* of that Act, it will be convenient to that section at once. It was as follows: "The income liable "to taxation under this Act of every person residing outside "of Saskatchewan who is carrying on business in Saskatchewan, "either directly or through or in the name of any other person, "shall be the net profit or gain arising from the business of "such person in Saskatchewan." "Person" under both Acts included a corporation. The relevant sections of the Act of 1932, as amended, and the history of the case are as follows:

Section 3 of the Act of 1932, so far as it was material for the present purpose, provided as follows: "For the purposes of "this Act, 'income' means the annual net profit or gain or "gratuity, whether ascertained and capable of computation as "being wages, salary or other fixed amount, or unascertained "as being fees or emoluments, or as being profits from a trade "or commercial or financial or other business or calling, directly "or indirectly received by a person from any office or employ- "ment, or from any profession or calling, or from any trade, "manufacture or business, as the case may be, whether "derived from sources within Saskatchewan or elsewhere;

J. C.
1948
INTERNATIONAL HARVESTER COMPANY OF CANADA, LD.
v.
PROVINCIAL TAX COMMISSION.

" and includes the interest, dividends or profits directly or " indirectly received from money at interest upon any security " or without security, or from stocks, or from any other " investment, and whether such gains or profits are divided or " distributed or not." The words " whether derived from " sources within Saskatchewan or elsewhere " were qualified, in the case of a non-resident person, by s. 21*a* already quoted.

Section 4 provided : " The following incomes shall not be " liable to taxation hereunder : (*m*) profits earned by a cor- " poration or joint stock company, other than a personal " corporation, in that part of its business carried on at a branch " or agency outside of Saskatchewan." It was clear that the appellant was not a " personal corporation " in the sense in which that phrase was used in the Act. Section 7 imposed the tax, and the following portions of it must be quoted : " (1.) There shall be assessed, levied and paid upon the income " during the preceding year of every person : (*d*) who, not being " resident in Saskatchewan, is carrying on business in Sas- " katchewan during such year ;

. . . . .

" a tax at the rates applicable to persons other than corpor- " ations and joint stock companies set forth in the first schedule " to this Act, upon the amount of income in excess of the " exemptions granted by this Act ; provided that the said rates " shall not apply to corporations and joint stock companies, " other than personal corporations.

. . . . .

" (3.) Save as herein otherwise provided, every corporation " and joint stock company, no matter how created or organized, " residing or ordinarily resident or carrying on business within " the province, shall pay a tax, at the rate applicable thereto " set forth in the first schedule to this Act, upon its income " during the preceding year.

" (4.) Where the commissioner is unable to determine or to " obtain the information required to ascertain the income " within the province of any corporation or joint stock com- " pany or of any class of corporations or joint stock companies, " the Lieutenant-Governor in Council may, on the recom- " mendation of the commissioner, make regulations for " determining such income within the province or may fix or " determine the tax to be paid by a corporation or joint " stock company liable to taxation."

Section 21 was as follows : " Where any corporation carry-

" ing on business in Saskatchewan purchases any commodity " from a parent, subsidiary or associated corporation at a price " in excess of the fair market price, or where it sells any " commodity to such a corporation at a price less than the " fair market price, the Minister may, for the purpose of determining the income of such corporation, determine the fair " price at which the purchase or sale shall be taken into the " accounts of the corporation." That section was immediately followed by s. 21*a*, which has already been quoted. Sections 22 to 25 were also of importance :

" 22. The income liable to taxation under this Act of every " person residing outside of Saskatchewan, who derives " income for services rendered in Saskatchewan, otherwise " than in the course of regular or continuous employment, " for any person resident or carrying on business in Saskatchewan, shall be the income so earned by such person " in Saskatchewan.

" 23.—(1.) Where a non-resident person produces, grows, " mines, creates, manufactures, fabricates, improves, packs, " preserves or constructs, in whole or in part, anything within " Saskatchewan and exports the same without sale prior to " the export thereof, he shall be deemed to be carrying on " business in Saskatchewan and to earn within Saskatchewan " a proportionate part of any profit ultimately derived from " the sale thereof outside of Saskatchewan.

" (2.) The Minister shall have full discretion as to the " manner of determining such proportionate part.

" 24.—(1.) Any non-resident person soliciting orders or " offering anything for sale in Saskatchewan through an " agent or employee, whether any contract or transaction " which may result therefrom is completed within Saskatchewan or without Saskatchewan, or partly within and " partly without Saskatchewan, or any non-resident person " who lets or leases anything used in Saskatchewan, or who " receives a royalty or other similar payment for anything " used or sold in Saskatchewan, shall be deemed to be carrying on business in Saskatchewan and to earn a " proportionate part of the income derived therefrom in " Saskatchewan.

" (2.) The Minister shall have full discretion as to the " manner of determining such proportionate part.

" 25. Nothing in sections 23 and 24 shall in any way affect " the generality of the term ' carrying on business ' as used " elsewhere in this Act."

Regulations were made by the Lieutenant-Governor in Council, in purported exercise of the power conferred on him by s. 7, sub-s. 4, of the 1932 Act. They were in the following terms:

"1. Interest, dividends, rents and royalties less their "proportionate share of deductions allowed shall be "separately determined or ascertained, and if they are "received in connexion with the trade or business of the "taxpayer in the province, shall be income liable to "taxation.

"2. The income referred to in reg. 1 having been "separately determined and ascertained, the remainder of "the income of the taxpayer liable to taxation shall be taken "to be such percentage of the remainder of the income as "the sales within the province bear to the total sales.

"The sales of the taxpayer shall be measured by the gross "amount which the taxpayer has received during the preceding year from sales and other sources in connexion "with the said business, excluding, however, receipts from "the sale or exchange of capital, assets and property not "sold in the regular course of business and also receipts "from interest, dividends, rents and royalties the income of "which has been separately determined or ascertained "under the provisions of reg. 1.

"3. If for any reason the portion of income attributable "to business within the province cannot be determined "under the provisions of reg. 2, the income referred to in "reg. 1 shall first be separately ascertained or determined "and for the purpose of ascertaining or determining the "proportion of the remainder of the income of the taxpayer, "such remainder of income shall be specifically allocated or "apportioned within and without the province by the "commissioner.

"4. If a taxpayer believes that the method of allocation "and apportionment herein prescribed or as determined "and as applied to his business, has operated or will so "operate as to subject him to taxation on a greater portion "of his income than is reasonably attributable to business "or sources within the province, he shall be entitled to file "with the commissioner a statement of his objections and "of such alternative method of allocation and apportionment "as he believes to be proper under the circumstances, with "such details and proof and within such time as the com-

J. C.
1948
INTERNATIONAL HARVESTER COMPANY OF CANADA, LD.
v.
PROVINCIAL TAX COMMISSION.

"missioner may reasonably prescribe, and if the "commissioner shall conclude that the method of allocation "and apportionment heretofore employed is in fact not "applicable or equitable, he shall re-determine the taxable "income by such other method of allocation and apportionment as seems best calculated to assign to the province for "taxation the portion of the income reasonably attributable "to business and sources within the province.

"5. These regulations shall not be applied to determine "the income within the province of a corporation or joint "stock company carrying on a trade or business within and "without the province where

"(*a*) the method or system of accounting used by the "taxpayer enables the commissioner to determine or to "obtain the information required to ascertain the income "of the taxpayer liable to taxation.

"(*b*) the income of the taxpayer liable to taxation can "be determined or ascertained by allowing the exemption "provided by para. (*m*) of s. 4 of the Income Tax Act, "1932"

It was common ground between the parties that in making the three assessments now in question the commissioner acted on reg. 2. It was also common ground that the commissioner, in making those assessments, had no evidence of, and did not compute or ascertain any, net profit or gain arising from or earned in the appellant's business in Saskatchewan, but, after computing the net income of the appellant everywhere, purported to fix the appellant's "income applicable to "Saskatchewan" by applying the percentage mentioned in that regulation. The "assessment" for 1936 was typical, reading in part as follows :

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"Net income subject to allocation ..	1,148,239.88
"Gross sales of company everywhere ..	11,489,313.45
"Gross sales of company in Sask. ..	2,128,603.92
"Percentage of Sask. sales to total sales	18·5268%
"Income applicable to Sask. 18·5268% "of $1,148,239.88	212,732.11
"Amount of tax at 5%	10,636.60
"Less tax paid under Corporations "Taxation Act	500.00
"Net tax payable	10,136.60."

On September 3, 1938, the appellant appealed against each of the said three assessments to the Board of Revenue Commissioners, pursuant to s. 40, sub-s. 8 (*a*), of the Treasury Department Act, 1938. On the hearing of that appeal a written admission of facts was filed with the board, with schedules and exhibits as therein referred to. The appellant put in the viva voce evidence of Arthur Brown, its branch manager at Regina, showing the conditions under which the appellant was carrying on business in Saskatchewan during the years in question. The appellant also filed an affidavit of its Vice-President, Frank M. Morton of Hamilton, Ontario, to show that the cost to the appellant of doing business in Canada varied greatly in different provinces and sections, and did not bear any fixed proportion to the amount of sales in any province or section. The respondents put in no evidence apart from the said admission of facts and schedules and exhibits thereto.

The Board of Revenue Commissioners, after reserving its decision, gave a written decision on January 27, 1939, dismissing the appellant's appeals from all three assessments and affirming the assessments.

On February 25, 1939, the appellant appealed to a judge of the Court of King's Bench of Saskatchewan from the decision of the Board of Revenue Commissioners respecting all three assessments, pursuant to s. 41 of the Treasury Department Act, 1938. On the hearing of that appeal the appellant filed with the King's Bench judge, Anderson J., under s. 41, sub-s. 6, of the Treasury Department Act, 1938, subject to the respondent's objection, three affidavits of Clarence B. Munger, general auditor of the appellant, of Hamilton, Ontario. The first and third of those affidavits dealt mainly with the question of a reserve for bad debts, but in the second affidavit Mr. Munger submitted two different methods or tests directed to showing that the assessments were excessive and arbitrary and had the effect of taxing manufacturing profit arising outside Saskatchewan. Anderson J., after hearing argument, reserved judgment, and on August 10, 1939, delivered a written decision, dismissing the appellant's appeals with costs.

On August 25, 1939, the appellant appealed to the Court of Appeal for Saskatchewan pursuant to s. 42 of the Treasury Department Act, 1938, and before that court the three appeals were, by consent, treated and argued as one appeal. The Court of Appeal reserved judgment, and on April 2, 1940, delivered judgment holding that it had no jurisdiction to entertain the appeal with respect to the assessment for 1934, but holding that the assessments for 1935 and 1936 were defective in not giving the appellant a deduction in respect of a reserve for bad debts. The assessments for those two years were set aside and referred back to the commissioner for reassessment, with instructions to reconsider the question of bad debt reserve, as stated in the judgment. In other respects the Court of Appeal dismissed the appellant's appeal, but allowed the appellant two-thirds of its costs of the appeals to the Court of Appeal and to the judge of the King's Bench court.

By special leave of the Court of Appeal, the appellant appealed to the Supreme Court of Canada from the judgment of the Court of Appeal, except those parts of the said judgment on which the appellant succeeded. The respondents cross-appealed to the Supreme Court of Canada against those parts of the judgment of the Court of Appeal on which the appellant succeeded. On April 22, 1941, the Supreme Court of Canada delivered judgment holding that there was a right of appeal respecting the 1934 assessment and allowing the appellant's appeal to the extent that the assessment for 1934 was set aside and referred back to the commissioner and placed in the same position as the said assessments for the year 1935 and the taxation period of 1936. The Supreme Court of Canada dismissed the respondents' cross-appeal with costs and allowed the appellant one-half of its costs of appeal to the Supreme Court. In other respects the majority of the Supreme Court of Canada (Rinfret, Crocket, Kerwin and Hudson JJ.), held that the appellant's appeal failed and was dismissed. Sir Lyman Duff, then Chief Justice of Canada, delivered a minority judgment, concurred in by Davis and Taschereau JJ., in favour of allowing the appellant's appeal and setting aside the said assessments, with costs to the appellant throughout.

1948. July 21, 22, 23, 27, 28. *F. L. Bastedo K.C.* (of the Canadian Bar) and *B. MacKenna* for the appellant. There are five grounds of appeal. First, since the appellant is a non-resident company s. 21*a* of the Act of 1932 (s. 23 of the Act of 1936) cuts down the general definition of income contained in s. 3 of both Acts, and cuts down the words "income" and "such income," where they are found in the charging sub-sections relating to companies—s. 7, sub-s. 3, of the Act of 1932 (s. 9, sub-s. 3, of the Act of 1936)—so as to limit the appellant's taxable income to the net profit or gain arising from its business in Saskatchewan, which is the same thing as "earned in Saskatchewan." The position is correctly stated by Duff C.J., when he said that "section 7, sub-s. 4 . . . . "limits the authority of the Lieutenant-Governor in Council "to making regulations 'for determining such income within "'the province'; 'such income' being (it cannot be anything "else) the income contemplated by the taxing provisions of the "statute as the subject of income tax; that is to say, in the "case of companies not resident in Saskatchewan, the profits "arising out of that part of their business that is carried on "in Saskatchewan." The second ground of appeal is that the income tax commissioner did not ascertain that net profit or gain, but instead resorted to reg. 2, and, by taking the percentage which Saskatchewan sales bore to the company's total sales everywhere, taxed that percentage of the appellant's manufacturing profit, all of which was admittedly earned outside Saskatchewan. [Reference was made to *Commissioners of Taxation* v. *Kirk* (1); *Grainger & Son* v. *Gough* (2); *Wm. Wrigley Jr., Co., Ld.* v. *Provincial Treasurer of Manitoba* (3); *Provincial Treasurer of Manitoba* v. *Wm. Wrigley Jr., Co., Ld.* (4); and *Commissioner of Taxation (N. S. W.)* v. *Hillsdon Watts, Ld.* (5).] A further argument on this second ground is that, even apart from any question of manufacturing profit, by using the percentage method the result obtained does not ascertain or compute the net profit or gain arising from or earned in its business in Saskatchewan, since the appellant's ratio of costs to earnings has been shown to be greater in Saskatchewan than in other provinces. That is an alternative argument, and the result is that the percentage method under reg. 2 taxes net profits outside the province. The third proposition is that the regulations relied on by the commissioner either do not apply to a non-resident company, or, if they do, then they are ultra vires the Lieutenant-Governor in Council as being a departure from or inconsistent with s. 21*a* of the Act. If the legislature had intended to amend s. 21*a* so as to extend liability for tax it should have said so in clear and unambiguous language: *Brunton* v. *Commissioner of Stamp Duties* (6). Fourthly, the judgment of Rinfret J. (concurred in by Crocket and Kerwin JJ.) erred in holding that the question whether profits or gains arose

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(1) [1900] A. C. 588, 592.
(2) [1896] A. C. 325.
(3) [1947] S. C. R. (Can.) 431, 436.
(4) (1945) 53 Manitoba R. 213, 216.
(5) (1937) 57 C. L. R. 36, 42.
(6) [1913] A. C. 747, 760.

J. C.
1948
INTERNATIONAL HARVESTER COMPANY OF CANADA, LD. *v.* PROVINCIAL TAX COMMISSION.

within or without the province was a question of fact decided against the appellant: *Bomford* v. *Osborne* (1). Lastly, and as an alternative to the above four grounds, it is submitted that if the Saskatchewan Acts and regulations purport to tax income earned or arising outside Saskatchewan they are ultra vires because they are in contravention of s. 92, head 2, of the British North America Act, 1867, as not being taxation within the province. The submission, briefly, is that the subject-matter of taxation in the province is income, and that the jurisdiction in the legislature of the province to tax income is limited by s. 92 (2.) of the Act of 1867 to income arising within the province. If the result of the statutes and regulations is that the manufacturing profit of a non-resident earned outside Saskatchewan is taxed, then that is not taxation within the province: *Rex* v. *Caledonian Collieries* (2); *Lovitt* v. *The King* (3) and *The King* v. *National Trust Co.* (4).

B. MacKenna followed.

R. S. Meldrum K.C., *F. C. Cronkite K.C.* (both of the Canadian Bar) and *Gahan* for the respondents. The general proposition applicable is that "any person found within the "province may legally be taxed there if taxed directly": *Bank of Toronto* v. *Lambe* (5). *Kerr* v. *Superintendent of Income Tax and Attorney-General for Alberta* (6), where the relevant section was word for word with the Saskatchewan Act, went so far as to say that the Income Tax Act of Alberta, 1932, imposed a tax on a person found in the province with respect to his income, including that derived from sources outside the province. On the question of construction, the first principle is that the words are to be given their natural and ordinary meaning, and the words "arising from the "business" in s. 21*a* are very apt to describe the total profits received from the sales in Saskatchewan. The profit arises in this case in Saskatchewan when the sale is made—it arises from the business of selling. "Source" is the transaction of sale; that is what gives rise to the income. The taxation imposed by the Acts and the regulations is direct taxation within the province within the meaning of s. 92 (2.) of the British North America Act. The regulations are intra vires the Lieutenant-Governor in Council and apply to the appellant.

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(1) [1942] A. C. 14, 49–50.
(2) [1928] A. C. 358, 363.
(3) (1909) 43 S. C. R. (Can.) 106, 160.
(4) [1933] S. C. R. (Can.) 670, 673.
(5) (1887) 12 App. Cas. 575, 585.
(6) [1942] S. C. R. (Can.) 435.

Section 21*a* is in fact an exemption provision, and, as such, must be strictly construed against the exemption, and the words " arising from " in that section must be construed as including the income received from sales in the province. Section 21*a* ought to be read with ss. 23 and 24 ; s. 23 expressly recognizes that the manufacturing process does not produce profits. Even assuming that s. 4 (*m*) would entitle a resident to exemption as therein provided, still, s. 21*a* uses different language. Section 21*a* is limiting the income to income received within the province of Saskatchewan. There are a number of cases on the question where income arises: *Laycock* v. *Freeman, Hardy and Willis, Ld.* (1)—there is no such thing as a manufacturer's profit except, as the Master of the Rolls pointed out in that case, in a notional sense : *Briton Ferry Steel Co.* v. *Barry* (2) distinguishes *Laycock's* case (1). The language of the relevant section in *Erichsen* v. *Last* (3) is substantially the same as in the present s. 21*a* and the situation there was parallel with the present case. Where there is provision for taxing profits arising to a business, as in s. 21*a*, there cannot be deducted what is referred to as a manufacturer's profit. Even assuming that some part of the manufacturing profit is taxed in Saskatchewan, such profit is received in Saskatchewan and is taxable there, and the fact that it may be taxed in Ontario as well is immaterial. [Reference was made to *In re Port Said Salt Association, Ld.* (4), *Wm. Wrigley Jr., Co., Ld.* v. *Provincial Treasurer of Manitoba* (5), and *In re Tindal* (6).] In looking at *Kirk's* case (7) what was being decided must be kept in mind. The question whether the Minister or commissioner of income tax is " unable to determine or obtain the information required " to ascertain the income within the province " being a condition precedent to the application of the regulations is a question of fact, with respect to which there is no appeal, and on the evidence the condition precedent existed. [Reference was made to *Rex* v. *Noxzema Chemical Co. of Canada, Ld.* (8).] The regulations are intended to tax only the income arising from the business of the appellant within the province and must in this case be resorted to in order to ascertain the income : *Attorney-General* v. *Till* (9). The amount to be taxed under the regulations is a percentage of the sales in Saskatchewan, and that percentage is identical with the ratio between the total profits and total sales, which amount does not necessarily exceed the amount of the net profit or gain arising from the business in Saskatchewan. The question whether profits or gains arose within or without Saskatchewan is a question of fact already decided against the appellant by the commissioner, the Board of Revenue Commissioners and the judge of the court of King's Bench, and with respect to which there is no further appeal.

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(1) [1939] 2 K. B. 1, 10.

(2) [1940] 1 K. B. 463.

(3) (1881) 8 Q. B. D. 414, 417, 419.

(4) (1932) I. L. R. 59 C. 1226, 1227–8.

(5) [1947] S. C. R. (Can.) 431.

(6) (1897) 18 N. S. W. 378.

(7) [1900] A. C. 588.

(8) [1942] S. C. R. (Can.) 178.

(9) [1910] A. C. 50, 72.

Gahan followed.

A reply was not required.

Oct. 19. The judgment of their Lordships was delivered by LORD MORTON OF HENRYTON, who stated the facts and statutory provisions set out above and continued: The main contention of the appellant is that the method adopted by the commissioner in ascertaining the net profit arising from the business of the appellant in Saskatchewan, for the purposes of s. 21*a*, is incorrect, in that it makes no allowance for a "manu-" facturing profit" earned outside Saskatchewan. The phrase "manufacturing profit," used throughout the argument before their Lordships' board, is inaccurate in the sense that no company makes an actual profit merely by manufacturing goods; the profit does not come to the company's hands until the goods are sold. The phrase can, however, conveniently be used for the present purpose. If an article is sold at a profit to a member of the public by a company which has manufactured the article and has also sold it through its own selling organization, it may be said that there are two stages in the production of the net profit, (1.) the manufacture of the article, (2.) the sale of the article, and that part of the net profit should be attributed to each stage, the part attributed to the earlier stage being described as a manufacturing profit. To quote from the judgment delivered by Sir Lyman Duff C.J., in the present case, in the Supreme Court of Canada: "The " appellant company is admittedly resident outside of Sas-" katchewan within the meaning of this provision; and the " business of the company in Saskatchewan is limited to making " contracts of sale by its agents and by them receiving the " proceeds of such sales. The profits of the company are derived " from a series of operations, including the purchase of raw " material or partly manufactured articles, completely manu-" facturing its products and transporting and selling them, and

BIBL. LOVAN

"receiving the proceeds of such sales. The essence of its "profit-making business is a series of operations as a whole. "That part of the proceeds of sales in Saskatchewan which is "profits is received in Saskatchewan, but it does not follow, "of course, that the whole of such profit 'arises from' that "part of the company's business which is carried on there "within the contemplation of s. 21*a*" (1). Thus, according to the argument for the appellant, that portion of the money received in Saskatchewan which represents net profit should be subdivided, and part of it should be treated as a "manu-"facturing profit" arising from the manufacturing business of the appellant outside Saskatchewan. Their Lordships understand that, if the principle for which the appellant contends is well founded, there will be no insuperable difficulty in determining what portion of the net profit represents manufacturing profit.

On March 27, 1942, special leave was given to the appellant to appeal against so much of the judgment of the Supreme Court of Canada as is adverse to the appellant. The presentation of the appeal has been delayed by various causes which need not be set out. The first contention of counsel for the appellant has already been indicated and may be summarized as follows: Since the appellant is a non-resident company, the only income of the appellant liable to taxation in respect of the three periods in question was the net profit or gain arising from the business of the appellant in Saskatchewan. The commissioner did not ascertain that net profit or gain, but instead resorted to reg. 2. By adopting the method already described, he taxed a percentage of the appellant's "manu-"facturing profit," all of which was earned outside Saskatchewan. This is the argument which was accepted by the minority in the Supreme Court of Canada, and Sir Lyman Duff C.J. expressed himself as follows: "Nowhere does the "statute authorize the province of Saskatchewan to tax a "manufacturing company, situated as the appellant company "is, in respect of the whole of the profits received by the "company in Saskatchewan. It is not the profits received in "Saskatchewan that are taxable; it is the profits arising from "its business in Saskatchewan, not the profits arising from the "company's manufacturing business in Ontario and from the "company's operations in Saskatchewan taken together, but "the profits arising from the company's operations in Sas-

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(1) [1941] S. C. R. 331.

J. C.
1948

INTERNATIONAL HARVESTER COMPANY OF CANADA, LD.
v.
PROVINCIAL TAX COMMISSION.

"katchewan (1)." Their Lordships find themselves entirely in agreement with these observations. They think that there is to be found in ss. 21 to 25 inclusive a scheme for dealing (inter alia) with the taxation of profits which are earned, or arise, or accrue or are derived—it matters not which phrase is used—from the activities of persons or corporations who carry on certain activities within the province of Saskatchewan and other activities outside that province. Section 21 applies both to resident and to non-resident corporations, and is plainly directed to preventing an artificial reduction of the net profit arising from the business of such corporations in Saskatchewan. Section 22 contemplates the case of a person residing and regularly employed outside Saskatchewan, who renders certain services within that province. Sections 23 and 24 show that the legislature contemplated, in the case of a non-resident person, a charge of tax on an apportioned part of income which, although it might be received outside the province of Saskatchewan, could fairly be regarded as having been partially earned inside that province. In their Lordships' view it would be reasonable to suppose that in the present case the legislature would regard a proportion of the profit received by the appellant in Saskatchewan as "arising" from its manufacturing business carried on outside that province, and as being, in consequence, exempt from taxation under the Act. They think that no distinction is intended between income "earned" in the province and income "arising" within the province. The word "earn" is employed in ss. 23 and 24 merely because of the grammatical structure of the sections. In each case the intention is to bring within the ambit of s. 21*a* an apportioned part of the "profit" mentioned in s. 23 and the "income" mentioned in s. 24, because such part of the profit or income is regarded as being earned within the province. Their Lordships think that if s. 21*a* is construed as excluding from taxation a "manufacturing profit" earned outside the province, effect is given to the general scheme of taxation set out in the Act. Further, this construction seems to their Lordships to result in a fair and reasonable scheme of taxation, in accordance with that comity which naturally prevails between one province and another.

Although the sections under consideration in *Commissioners of Taxation* v. *Kirk* (2) differed in their language from the section now under consideration, the reasoning which appears

(1) [1941] S. C. R. 334.

(2) [1900] A. C. 588.

J. C.
1948

INTERNATIONAL HARVESTER COMPANY OF CANADA, LD.
v.
PROVINCIAL TAX COMMISSION.

in the judgment in that case is helpful to the appellant's contention in the present case. Lord Davey, in delivering the judgment of the board, said: " Their Lordships attach no " special meaning to the word ' derived,' which they treat as " synonymous with arising or accruing. It appears to their " Lordships that there are four processes in the earning or " production of this income—(1.) the extraction of the ore from " the soil; (2.) the conversion of the crude ore into a merchantable product, which is a manufacturing process; " (3.) the sale of the merchantable product; (4.) the receipt of " the moneys arising from the sale. All these processes are " necessary stages which terminate in money, and the income " is the money resulting less the expenses attendant on all the " stages . . . . The fallacy of the judgment of the Supreme " Court in this and in *Tindal's* case is in leaving out of sight " the initial stages, and fastening their attention exclusively " on the final stage in the production of the income (1)."

In their Lordships' view, the fallacy of regarding a profit as arising solely at the place of sale appears also in the arguments advanced on behalf of the respondents in the present case. Counsel on their behalf contended that when money was received by the appellant in Saskatchewan as a result of a sale in Saskatchewan the whole of the net profit on the sale " arose " from the business of the appellant in Saskatchewan, and no apportionment was necessary. They referred to certain cases in which various courts have found no reason for treating a profit as being earned or as arising partly within and partly without a particular country. In no one of these cases, however, was the relevant section accompanied by other sections contemplating such an apportionment of profits as is provided for by ss. 23 and 24 in the present case. Reference was also made to the judgment of the Supreme Court of Canada in *Wm. Wrigley Jr., Co., Ld.* v. *Provincial Treasurer of Manitoba* (2), but as this case is at present the subject of an appeal to their Lordships' board it would not be proper to make any observations on it.

The result is that, in their Lordships' view, any part of the appellant's net profit which may fairly be attributed to its manufacturing operations outside the province of Saskatchewan, referred to throughout the argument as its " manufacturing " profit," is not profit arising from the business of the appellant in Saskatchewan within the meaning of s. 21*a* of the Act, and

(3) [1900] A. C. 588, 592–3.

(2) [1947] S. C. R. (Can.) 431.

must be excluded in ascertaining the income of the appellant liable to taxation under that section. It was suggested in argument that the proper method of ascertaining the "manufacturing profit," was to estimate the net profit which the appellant would have obtained if, instead of selling goods retail through its own selling organization in Saskatchewan, it had sold the same goods, direct from its factory, to a wholesaler. This method seems not unreasonable, but their Lordships do not desire to select any particular method as being the best, since this would appear to be a practical matter, not fully explored in argument. The assessments now in question have already been set aside and referred back to the commissioner for re-assessment, with instructions to reconsider the question of bad debt reserve. They must be further reconsidered in the light of this judgment.

Turning to the other matters raised in argument, their Lordships see no reason why the regulations made under s. 7, sub-s. 4, should be construed as applying only to persons or corporations resident within the province of Saskatchewan, and they do not think that the Lieutenant-Governor exceeded his powers in making these regulations. No objection to reg. 1 has been raised in argument. Regulation 2 might well be open to objection, as being likely to tax income outside the province, if it were not modified by regs. 3, 4 and 5. So modified, it does not appear to contravene the provisions of the statutes of 1932 and 1936. It merely provides a rough-and-ready way of measuring "the remainder of the income of the taxpayer liable "to taxation" in cases coming within s. 7, sub-s. 4, and in some of such cases it may be a not inappropriate method of measuring such income. It is not, however, appropriate in the present case, because it pays no regard to the question of manufacturing profit. In their Lordships' opinion the present case falls within reg. 3 and the commissioner should have carried out the assessment under that regulation, giving due regard to the question of manufacturing profit. They add that in their view the facts brought the present case within the terms of s. 7, sub-s. 4, as the appellant's system of keeping accounts during the three periods in question resulted in the Minister being "unable to determine the income within the province" of the appellant without recourse to the regulations.

Two other points raised by counsel for the appellant should be briefly mentioned. They contended that if the Acts of 1932 and 1936 or the regulations purported to tax income of the

J. C.

1948

INTERNATIONAL HARVESTER COMPANY OF CANADA, LD. *v.* PROVINCIAL TAX COMMISSION.

appellant arising outside Saskatchewan, then they went beyond the power conferred on the province, by s. 92 (2.) of the British North America Act, 1867, to impose taxation "within the "province." This was an alternative argument, and as the appellant's main contention has succeeded the alternative argument does not arise. In their Lordships' view, neither the Acts of 1932 and 1936 nor the regulations, correctly construed, purport to tax income of the appellant arising outside Saskatchewan. Counsel also contended that, apart altogether from the argument as to "manufacturing profit," the method followed by the commissioner did not result in ascertaining the net profit arising from the business of the appellant in Saskatchewan, because the appellant's ratio of costs to sale was not uniform throughout Canada, and had been shown by evidence to be greater in Saskatchewan than in other parts of Canada. In their Lordships' view this contention cannot succeed, in regard to the three periods now in question, by reason of the view aken by the Board of Revenue Commissioners as to the evidence before that board. It will be sufficient to quote one passage from that board's decision. After referring to the evidence of Mr. Brown and Mr. Morton, already mentioned, the board continued: "Both portions of "said evidence compared certain factors in Saskatchewan "with factors elsewhere but neither witness gave evidence or "established that when all factors are taken into consideration "the cost of doing business in Saskatchewan exceeds that of "doing business elsewhere. The board, therefore, while "finding on this evidence that there are varying ratios of "expense to sales in various parts of Canada cannot, on the "evidence submitted, make any finding as to whether that "ratio in Saskatchewan is higher, equal to or less than that "ratio elsewhere. Certain special items of expense or loss in "Saskatchewan were referred to by each witness. No findings "can be made on such an incomplete picture. These special "items of expense or loss may be offset or exceeded by "favourable factors such as volume of sales in an agricultural "province where a highly mechanized type of farming is "engaged in. In so far as the witness Arthur Brown in some of "his replies suggested a comparatively unfavourable result in "Saskatchewan, the board finds his evidence inconclusive and "not definitely enough linked up with the three taxation years "under review. The board further finds that it was not sufficiently shown that this witness had personal knowledge of

J. C.

1948

INTERNATIONAL HARVESTER COMPANY OF CANADA, LD. *v.* PROVINCIAL TAX COMMISSION.

" all the facts in other provinces necessary to make a complete " comparison. Frank M. Morton's affidavit is not directed to " a complete comparison at all. It has not, therefore, been " established that the tax levied in any of the three years is " higher than it should have been." This particular view of the facts is not shown to be vitiated by any incorrect view of the law, as no question of " manufacturing profit " outside Saskatchewan entered into it.

Counsel for the respondents sought to rely on certain findings by the commissioner of income tax, the Board of Revenue Commissioners and Anderson J., as being findings of fact which concluded the matter in favour of the respondents. This argument was accepted by Rinfret J. (as he then was). In his judgment in the Supreme Court, with which Crocket and Kerwin JJ. concurred, he said : " At the outset, the appellant " is met by the difficulty that the question whether profits or " gains arose within or without Saskatchewan is really a " question of fact already decided against it by the " commissioner of income tax, the Board of Revenue Com" missioners and the judge of the court of King's Bench " (1). Hudson J., who agreed with Rinfret J. in dismissing the appeal to the Supreme Court, observed : " Now it is claimed that the " mode of allocation prescribed in the regulations, in its appli" cation to the assessments here, fails to take into account " manufacturing profits which may have been earned by the " appellants outside of Saskatchewan. This claim was made " before the board and, although it does not seem to have " received as much consideration there as it did before us, it was " considered by them. Apparently the board thought that, " while it was a factor to be considered, it formed only one of a " group of imponderables, incapable of separate evaluation with " any degree of certitude . . . . If it could be said that the " commissioner and the board and Anderson J. had miscon" strued the statute or the regulations, or failed to direct their " minds to the questions involved, then the court would be " justified in sending it back for reconsideration " (2).

In their Lordships' view s. 21*a* of the statute has been misconstrued, to the extent already indicated, and for this reason any findings of fact based on this misconstruction cannot be treated as being binding on the appellants. In the result, their Lordships will humbly advise His Majesty that this appeal should be allowed, and that the three assessments in question,

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(1) [1941] S. C. R. 351.

(2) Ibid. 361.

J. C.
1948
INTERNATIONAL HARVESTER COMPANY OF CANADA, LD. *v.* PROVINCIAL TAX COMMISSION.

already set aside and referred back to the commissioner for re-assessment, should be further reconsidered in the light of the opinions expressed herein. The appellant has already been awarded two-thirds of its costs of the appeals to the Court of Appeal and to the judge of the King's Bench Court and one-half of its costs of the appeal to the Supreme Court of Canada. The respondents must now pay to the appellant the balance of all these costs and also the whole of the appellant's costs of this appeal.

Solicitors for appellant : *Gard, Lyell & Co.*
Solicitors for respondents : *Blake & Redden.*

[HOUSE OF LORDS.]

H. L. (E.)*
1948
June 22, 23, 24; *Nov.* 9.

SHELLEY . . . . . . APPELLANT
AND
LONDON COUNTY COUNCIL . . RESPONDENTS.

HARCOURT . . . . . . APPELLANT
AND
SAME . . . . RESPONDENTS.

Housing — Local authority — Working class house — Letting for more than 20l. a year—Claim for possession under Small Tenements Recovery Act, 1838 (1 *&* 2 *Vict., c.* 74), *s.* 1*—Warrant for possession —Magistrate's discretion—Housing Act,* 1934 (26 *Geo.* 5 *and* 1 *Edw.* 8, *c.* 51), *s.* 83, *sub-s.* 1 *; s.* 156, *sub-ss.* 1, 2.

By the Housing Act, 1936, s. 83, sub-s. 1 : "The general "management, regulation, and control of houses provided by "a local authority under this Part of this Act shall be vested in "and exercised by the authority, and the authority may make such "reasonable charges for the tenancy or occupation of the houses "as they may determine."

By s. 156 : "(1.) Nothing in the Rent and Mortgage Interest "Restrictions Acts, 1920 to 1923, as amended by any subsequent "enactment shall be deemed . . . . to prevent possession being

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* *Present :* LORD PORTER, LORD WRIGHT, LORD UTHWATT, LORD DU PARCQ and LORD MORTON OF HENRYTON.

"obtained (*a*) of any house possession of which is required for the "purpose of enabling a local authority to exercise their powers "under any enactment relating to the housing of the working "classes . . . . (2.) Where a local authority for the purpose of "exercising their powers under any enactment relating to the "housing of the working classes, require possession of any building "or any part of a building of which they are the owners, then "whatever may be the value or rent of the building or part of a "building they may obtain possession thereof under the Small "Tenements Recovery Act, 1838, as in the cases therein provided "for, at any time after the tenancy of the occupier has expired "or has been determined."

In two cases the London County Council, who were the owners of tenements built by them for the housing of the working classes, claimed possession from the existing tenants of premises comprised therein, under the Small Tenements Recovery Act, 1838, s. 1, for the purpose of housing other members of the working classes. The rent in each case exceeded 20*l*. Under that Act the jurisdiction of the magistrate was limited to premises of an annual value of less than 20*l*. but, having regard to s. 156, sub-s. 2 of the Housing Act, 1936, the magistrates who heard the two cases issued warrants for possession. In one case the magistrate relied on s. 5, sub-s. 4 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as enabling the issue of the warrant to be suspended beyond the thirty days provided by the Act of 1838.

Held (per LORD PORTER, LORD WRIGHT, LORD UTHWATT and LORD MORTON OF HENRYTON, LORD DU PARCQ dissenting) that for the purposes of the exercise of their powers of "general "management, regulation and control" of the premises under s. 83, sub-s. 1 of the Act of 1936, it was requisite that the council should after due notice have the right to oust the tenants thereof, whose tenancies were accordingly removed in this respect from the protection of the Rent Restriction Acts by s. 156, sub-s. 1 (*a*).

Held further (1.) that, by reason of s. 156, sub-s. 2, of the Act of 1936, the jurisdiction given by the Act of 1838 was not now limited to houses not exceeding 20*l*. in annual value; (2.) that s. 1 of the Act of 1838 limited the length of time afforded to a tenant before the warrant was to be executed and allowed no further extension beyond thirty days.

Decision of the Court of Appeal [1948] 1 K. B. 274, affirmed.

APPEALS from the Court of Appeal (Lord Greene M.R., Bucknill and Somervell L.JJ.).

The facts, stated by LORD PORTER, were as follows: Mrs. Shelley, the appellant in the first case, occupied a flat, No. 8 Barnaby Buildings, Leroy Street, in the county of London, of which the respondents were landlords. It was rated at 11*l*. a year and she paid a rent of 14*s*. 5*d*. a week or 37*l*. 9*s*. 8*d*. a year. Notice to quit expiring on December 9, 1946, was served on her. She failed to go out and accordingly the respondents, after taking the necessary preliminary steps, commenced proceedings under the Small Tenements Recovery Act, 1838, to obtain possession. Mrs. Harcourt, the appellant in the second case, was the occupier of other premises belonging to the respondents, also of a value exceeding 20*l*. a year and, like the first appellant, was given due notice to quit and, as she refused to do so, had similar proceedings taken against her by the respondents. Both appellants were members of the working classes and the tenements occupied by them were erected by the respondents under the provisions of the Housing of the Working Classes Act, 1890, for the housing of the working classes. The second appellant had been guilty of a breach of a condition of her tenancy and refused to abate it but, save for her continuancy, it was not of serious consequence. In the case of the first appellant there was no complaint of any breach of the terms of occupation. In this case the learned magistrate, sitting at Tower Bridge, to whom application had been made, issued a warrant for possession but directed that it should remain in force but not be executed for three months and that the first appellant should have liberty to apply, before the expiration of that time, for a further period of extension. In the case of the second appellant a similar application was made to the learned magistrate sitting at Clerkenwell, who held that he had no discretion either to refuse or to postpone possession and accordingly issued a warrant for possession in thirty days from the date of issue. Each of the learned magistrates stated a case for the opinion of the High Court and the two matters were considered together both by the Divisional Court and by the Court of Appeal. Both courts agreed with the latter decision but in the first case remitted the matter to the learned magistrate with an intimation that the warrant could be suspended for not more than thirty days and, in the second case, affirmed the orders of the learned magistrate. From these orders both appellants appealed to the House of Lords.

Ackner for the appellants. These premises are within the protection of the Rent Restriction Acts. By s. 7, sub-s. 1 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, a dwelling-house " shall be deemed to be a dwelling-" house to which those Acts apply unless the contrary be " shown." They apply except so far as s. 156 of the Housing Act, 1936, excludes them: see s. 3, sub-s. 2 (*c*) of the Rent and

Mortgage Interest Restrictions Act, 1939. Even if an order for the recovery of possession be made the court has a discretion to suspend execution: Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 5, sub-ss. 2 and 4: see *R.* v. *Snell* (1). The main grounds of appeal are: (*a*) The magistrates had no jurisdiction to make an order for possession under the Small Tenements Recovery Act, 1838; (*b*) the respondents' right to recover possession was subject to the provisions of the Rent Restriction Acts and that depends on whether or not they require possession "for the purpose of exercising their powers "under any enactment relating to the housing of the working "classes" within s. 156, sub-s. 1 of the Housing Act, 1936; (*c*) the magistrates had a discretion under the Small Tenements Recovery Act, 1838, s. 1, to refuse to issue a warrant for possession. The effect of the case for the respondents is that if they were right local authorities would be able to eject their tenants whenever or for whatever reason they chose because, once the contractual tenancy was determined there could be no reliance on the Rent Restriction Acts for any further security of tenure. The Divisional Court were reluctant to place on the relevant sections of the Housing Act an interpretation which would produce this result. If the respondents were right the anomalous position would be created that the rents chargeable in respect of houses not excepted under s. 3, sub-s. 2 (*c*) of the Rent and Mortgage Interest Restrictions Act, 1939, would be controlled by the Rent Restriction Acts while the right to possession was not. But security of tenure is a necessary corollary of fixing rents. If the legislature had intended that the Acts should apply only so far as the fixing of rents was concerned and should not give security of tenure this should have been expressed in clear and unambiguous language. The Acts of Parliament dealing with the housing of the working classes and relevant to this point are as follows: Labouring Classes Lodging Houses Act, 1851; Housing of the Working Classes Act, 1890; Housing of the Working Classes Act, 1900; Rent and Mortgage Interest (War Restrictions) Act, 1915, s. 2, sub-s. 2; Housing, Town Planning, Etc., Act, 1919, in which s. 35 is the first foreshadowing of s. 156, sub-s. 1 (*a*) of the Housing Act, 1936; Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 5, sub-s. 1 (*e*) and s. 12, sub-s. 2; Increase of Rent and Mortgage Interest Restrictions (Continuance) Act, 1923, s. 4; Housing Act, 1925, ss. 57, 60,

(1) [1942] 2 K. B. 137.

63, 67 and 128, the last section dealing with the same subject as s. 156, sub-s. 1 (*a*) of the Act of 1936; Housing Act, 1930, in which s. 59 took the place of s. 128 of the previous Act; Housing Act, 1935, in which s. 86 did not carry the matter any further; Housing Act, 1936, ss. 15, 26, 36, 65, 71 and 156; Acquisition of Land (Authorization Procedure) Act, 1946, s. 8, sub-s. 1 (definition of " local authority ") : see also *Parry* v. *Harding* (1). The deductions to be drawn from the history of these Acts are : (*a*) Since 1890 the bodies responsible for the administration of the Housing of the Working Classes Acts have been the local authorities. (*b*) The main purposes of those Acts are (i.) to ensure that a sufficiency of accommodation is provided for the working classes, and (ii.) to get rid of insanitary dwellings. (*c*) Specific powers are given to the local authorities to achieve this end. (*d*) After the first of the Rent Restriction Acts in 1915 it was clear that local authorities acting as the bodies responsible for administering the Housing Acts might be seriously hampered by the Rent Restriction Acts in seeking to achieve the two main purposes. A distinction must, however, be drawn between the capacities in which local authorities act, viz., (i.) as the bodies responsible for administering the Housing Acts, and (ii.) having administered those Acts by providing accommodation, thereafter as landlords, once the members of the working classes have been housed by them. In serving the notices to quit and applying for the issue of a warrant the respondents were not exercising any " powers under " any enactment relating to the housing of the working classes," within s. 156, sub-s. 1 (*a*) of the Housing Act, 1936, for they did not depend on s. 83, sub-s. 1 of that Act for their power to manage their property; that sub-section did not confer any powers on them within the meaning of s. 156, sub-s. 1 (*a*). The function of s. 83, sub-s. 1, is twofold : (*a*) In stating that the general management, regulation and control is vested in the local authority it is purely declaratory. (*b*) In stating that the general management, etc., shall be exercised by the local authority it is prohibiting the local authority from transferring or delegating the functions of management save as is provided by the Act. These are not " powers " within s. 156, sub-s. 1 (*a*), where the word refers to the specific powers given to a local authority as such in its capacity as the body responsible (*a*) for providing accommodation for the working classes and (*b*) for getting rid of insanitary dwellings. This section does not

(1) [1925] 1 K. B. 111.

H. L. (E.)

1948

SHELLEY v. LONDON COUNTY COUNCIL. HARCOURT v. SAME.

appear grouped in part V of the Act under the heading "General Powers and Duties of Local Authorities" and the same is true of its predecessor in preceding Acts. It appears under the heading "Management, etc., of Local Authority's "Houses" and is immediately followed by ss. 84 and 85 which provide for the control of the management of local authorities houses and which give the local authorities power to make by-laws. The sanction for breach of a by-law is provided by s. 251 of the Local Government Act, 1933, and is a fine not exceeding 5*l*. In the circumstances contemplated by s. 156, sub-s. 1 the local authority is not acting as a landlord but as the body responsible under the Acts for providing accommodation for the working classes or for getting rid of insanitary dwellings. A partial exception is s. 156, sub-s. 1 (*b*), but in that case also it is acting in that capacity in enforcing by-laws for the prevention of overcrowding, though sometimes it may be acting as landlord as well. To exercise the specific powers enumerated possession is essential. The phrase in s. 156, sub-s. 1 (*a*) is only an omnibus clause to cover any case when powers are given to a local authority. If the respondents were right in their construction of s. 156, sub-s. 1 (*a*), a local authority in seeking possession in connexion with a by-law relating to overcrowding would not require the protection of s. 156, sub-s. 1 (*b*), which would be unnecessary because the case would already be covered. *Parry* v. *Harding* (1) is distinguishable. In that case there was an attempt to exercise a specific power but that is not so here. The exercise of a specific power is the antithesis of the performance of general duties. An adequate content can be give to s. 156, sub-s. 1 (*a*), by reason of its applicability to the case of a house compulsorily acquired under the Act of 1936: see ss. 72, 73, 74, 79 and 80. Thus a local authority might have acquired compulsorily or by agreement land on which there was a house of which they had not first obtained vacant possession and, having acquired it, they might then under s. 72, sub-s. 1, wish to convert it into a house for the working classes or to put a working class tenant into it. Vacant possession would be essential in that case and also in a case where they wished to make improvements under the same sub-section. In such a case they could rely on s. 156 sub-s. 1, (*a*) because they would be acting under a specific power. As a result of the relationship of landlord and tenant resulting when a local authority lets a house to a working class tenant, the local authority cannot eject him while his tenancy continues. If they wish to eject him, then still acting in the capacity of landlords they must serve a proper notice to quit. If the tenant refuses to comply they may take proceedings in the appropriate court, still acting as landlords. In seeking to obtain possession they are exercising their ordinary common law powers as owners of property. Neither in serving notices to quit nor in taking proceedings for ejectment are they dependent on any statutory powers. In s. 87 of the Act of 1936 there is support for the appellants' contention. It provides for a transfer of functions from the local authority to a housing management commission and if full advantage were taken of the section local authorities would no longer control the houses they provided, since the provision is for transfer and not for delegation, and after transfer the functions cannot be resumed. On the contention of the respondents there would be two species of working class tenants, one not transferred and enjoying no security of tenure and the other transferred and enjoying security of tenure since a housing management commission would have less powers than a local authority. The position would be absurd. Further, in Shelley's case the respondents are seeking to eject a working class tenant against whom no suggestion is made to make room for another member of the working class as yet unidentified. This does not amount to "management" within s. 83, sub-s. 1. "Management, "regulation and control" can be fully exercised even though the tenants have a right to retain their holdings by virtue of the provisions of the Rent Restriction Acts. The respondents have managed this property while Mrs. Shelley has been in possession and there is nothing to prevent their continuing to do so in future. Management means controlling the property in the way best suited to its interests. There is no suggestion that if Mrs. Shelley remains in occupation this will be prejudicial to the interests of the property. There is no suggestion that if the flat were to be occupied by the unascertained tenant proposed this would be more beneficial to the property and therefore the respondents cannot say that they require possession in order to manage this property. Further, since the rent payable in respect of both the tenements was in excess of 20*l.* a year and since the respondents were not exercising powers under any enactment relating to the housing of the working classes, the magistrates had no jurisdiction to make the orders: Small Tenements Recovery Act, 1838, s. 1.

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(1) [1925] 1 K. B. 111.

Alternatively that section gave them a discretion to refuse to issue a warrant for possession. "Reasonable cause why "possession should not be given" must be construed in the ordinary sense of the words, viz., a cause which commends itself to the court as reasonable—not necessarily a good defence in law. Here there is no ground for terminating the tenancies but the desire of the respondents to substitute other tenants of their own choosing. The hardship caused to the appellants by their eviction constitutes a reasonable cause for refusing to issue the warrant. In any event it was "lawful" under the section but not compulsory for the magistrates to order the warrant to be executed within thirty days.

Lloyd-Jones and *Richard Harvey* for the respondents. The respondents in serving notices to quit on the appellants and in applying under s. 1 of the Small Tenements Recovery Act, 1838, for the issue of warrants of possession of the houses occupied by the appellants for the purpose of replacing tenants who are members of the working classes by other tenants of the same class, were exercising a power within the meaning of s. 156 of the Housing Act, 1936, and were accordingly entitled to orders for possession. As a matter of pure construction it is clear that s. 156, sub-s. 1 (*a*), refers to and includes the powers referred to in s. 83, sub-s. 1, and conferred by it. The history of the Housing Acts confirms this contention. Local authorities as landlords are the creatures of statute and so cannot be considered in the same light as common law landlords. The Rent and Mortgage Interest Restrictions Act, 1939, s. 3, sub-s. 2 (*c*), illustrates how scrupulous the legislature has been to free local authorities from the trammels of the Rent Restriction Acts: see also Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 9. The legislature designedly placed local authorities in a position, in relation to these Acts, which is different from that of ordinary landlords, on account of the nature of their interests and duties in the matter of the provision of housing. These Acts and in particular s. 5 of the Act of 1920 have no application to the houses now in question. As regards the rest of s. 156, sub-s. 1 of the Housing Act, 1936, after (*a*), viz., (*b*), (*c*), (*d*) and (*e*), these were intended to cover the case of an owner who is not a local authority since owners may be under an obligation to take part in re-development: see s. 50. The respondents were entitled to possession. Upon proof of due compliance with the requirements of s. 1 of the Small Tenements Recovery Act, 1838, the magistrates have no discretion to refuse to order the issue of a warrant for possession or to suspend or postpone its execution beyond the limit of the time prescribed by that section. Nor was there any discretion under the Rent Restriction Acts as to the issue of warrants for possession or as to the suspension or postponement of their execution. Circumstances of hardship, if established, do not constitute "reasonable cause" within s. 1 of the Act of 1838. On this point the observations of Lord Greene M.R. and Lord Goddard C.J. in the present case are relied on. As to the authorities, *R.* v. *Snell* (1) decided that a local authority can recover possession of a dwelling provided for the housing of the working classes by the procedure of s. 1 of the Small Tenements Recovery Act, 1838, in cases where the only reason for requiring possession was to replace one member of the working classes by another as tenant. This decision was right and in accordance with the policy of the Housing Acts. The passages, which appear to decide that the justices have a discretion under s. 5, sub-s. 4 of the Rent and Mortgage Interest (Restrictions) Act, 1920, to suspend and postpone the execution of the warrant for a period beyond that limited by s. 1 of the Act of 1838, were obiter and unnecessary for the decision of the only question before the court. On the main point the court decided as they did reluctantly because they felt compelled to do so. *Parry* v. *Harding* (2) had been decided by the time the Rent and Mortgage Interest (Restrictions Continuation) Act, 1933, was passed and, accordingly, the legislature thought it unnecessary to include a provision granting exemption to local authorities. [They also referred to the Housing Act, 1930, s. 39.]

Ackner in reply. The first trace of s. 83 of the Housing Act, 1936, is to be found in s. 45 of the Labour Classes Lodging Houses Act, 1851. Under s. 83 local authorities are in the same position as other landlords.

Nov. 9. Lord Porter. My Lords, in both cases the main question for the decision of your Lordships' House is whether the Rent and Mortgage Interest Restrictions Acts, 1920–39 apply to an action by a local authority to recover possession of a dwelling-house from a tenant who has been provided with accommodation by the local authority under its statutory

(1) [1942] 2 K. B. 137.

(2) [1925] 1 K. B. 111.

powers for the housing of the working class in a case where the action of the local authority has been taken with a view to the housing of another member of that class. Two subsidiary questions were also raised: the first being whether the provisions of the Small Tenements Recovery Act, 1838, give a right of recovery of possession in such a case: the second whether, if they do, the justices in an action under s. 1 have a discretion to refuse or to postpone the issue of a warrant for possession.

My Lords, each of the appellants is undoubtedly protected by the provisions of the Rent and Mortgage Interest Restrictions Act, unless that protection is taken away by the terms of the Housing Act of 1936. Section 156, sub-s. 1 of that Act, so far as is material, is in the following terms: "Nothing in the "Rent and Mortgage Interest Restrictions Acts, 1920 to 1933, "as amended by any subsequent enactment shall be deemed ". . . . to prevent possession being obtained (*a*) of any house "possession of which is required for the purpose of enabling "a local authority to exercise their powers under any enactment relating to the housing of the working classes . . . ." Section 83, sub-s. 1 of the same Act reads: "The general "management regulation and control of houses provided by a "local authority under this Part of this Act shall be vested in "and exercised by the authority, and the authority may make "such reasonable charges for the tenancy or occupation of the "houses as they may determine," and the Act itself stipulates that certain classes of houses (amongst which these are included) provided under earlier statutes shall be treated as if they were provided under the statute of 1936.

If, then, the general management, regulation and control of houses includes the right to oust the tenant, the local authority in giving notice to quit were exercising their powers under an enactment relating to the housing of the working classes, and the protection afforded to tenants of private owners does not apply. For the appellants it was argued that management, regulation and control could be fully exercised even though the tenants had a right to retain their holdings by reason of the provisions of the Rent Acts, and urged that, as the respondents were prepared to accept the position that they were subject to the obligation not to exceed the statutory rent, so they were similarly obliged to retain their tenants as statutory tenants. My Lords, I do not know whether the concession in question is necessarily made or not, but whether the Rent Acts apply to the extent of fixing a statutory rent or not, " management " must in my view include a right to terminate the tenancy so far as the general law allows, i.e., after due notice. It is to my mind one of the important duties of management that the local body should be able to pick and choose their tenants at their will. It is true that an ordinary private landlord cannot do so, but local authorities who have wider duties laid on them may well be expected to exercise their powers with discretion and in any case the wording of the Act seems to me to necessitate such a construction.

As to the other two points: (1.) Under the Act of 1838 the jurisdiction of the magistrate was limited to premises of an annual value of less than 20*l.*, but this limitation of jurisdiction has been expressly widened by s. 156, sub-s. 2 of the Housing Act, 1936, which ordains that: " Where a local authority, " for the purpose of exercising their powers under any enact-" ment relating to the housing of the working classes, require " possession of any building or any part of a building of which " they are the owners, then, whatever may be the value or " rent of the building or part of a building, they may obtain " possession thereof under the Small Tenements Recovery Act, " 1838, as in the cases therein provided for, at any time after " the tenancy of the occupier has expired, or has been deter-" mined." It follows that the jurisdiction given by the Act is not now limited to houses not exceeding 20*l.* in annual value. (2.) As to the jurisdiction of the justices to refuse a warrant for possession or postpone its execution, the matter stands thus: Section 1 of the Small Tenements Recovery Act, 1838, provides that after due notice if the tenant or occupier should not " appear at the time and place appointed, and show to the " satisfaction of the justices. . . . reasonable cause why " possession should not be given . . . . it shall be lawful for " the justices . . . . to issue a warrant " to the appropriate constables commanding them within a period to be therein named not less than twenty-one nor more than thirty clear days from the date of the warrant to enter into the premises and give possession of the same to the landlord. On this wording it was argued on behalf of the tenants that there was no ground for terminating the tenancy except the desire of the local authority to substitute another tenant of their own choosing, that the hardship caused to the tenants by their eviction constituted " reasonable cause " for refusing to issue the warrant, and in any case it was " lawful " for but not compulsory upon the justices to order the warrant to be executed within thirty days. My Lords, I agree with Lord Goddard C.J. in thinking that, on its true construction, the Act does not leave it to the discretion of the magistrate to oust or not to oust according as he or she may consider the personal position of and hardship caused to an individual tenant. Such a construction to my mind leaves the landlord's right much too vague. " Reasonable cause " means, I think, some cause which gives a right in law for the tenant to remain. As to the use of the words " it shall be lawful," I cannot accept the view that that expression means that it is left to the magistrate to issue or not to issue the warrant at his discretion or to postpone its execution. Again, I agree with the Lord Chief Justice that the phrase " it shall be lawful " was inserted because up to the passing of the Act magistrates had no such power and s. 1 thereupon gave them power and made it lawful for them to act. Furthermore, I see no reason for coming to the conclusion that the justices could postpone the execution of the warrant at their pleasure. The Act in terms stipulates that the warrant shall command the constables to enter not more than thirty days after the issue of the warrant. This wording, in my opinion, limits in plain terms, the length of time afforded to the tenant before the warrant is to be executed and allows no further extension.

For these reasons I find myself in agreement with the judgment of the Court of Appeal and would dismiss both appeals to your Lordships' House.

LORD WRIGHT. My Lords, notwithstanding the able argument of Mr. Ackner, which loses no merit by not being successful, I think that the appeals should be dismissed for the reasons contained in the opinions of my noble and learned friends LORD PORTER, LORD UTHWATT and LORD MORTON OF HENRYTON, which I have read in print.

LORD UTHWATT. My Lords, Mr. Ackner, in his able argument, very properly brought under review the course of legislation under the Rent Restriction Acts and the Housing Acts relating to the position of local authorities as respects houses to which in general the Rent Restriction Acts apply. I do not propose to refer to that legislation, for a close consideration of it has not revealed to me anything which is germane to the proper construction of head (*a*) of s. 156

sub-s. 1 of the Housing Act, 1936. I would only mention that the complete exemption from the Rent and Mortgage Interest Restrictions Act, 1939 (see s. 3, sub-s. 2 (*c*) of that Act) of dwelling-houses to which s. 128 of the Housing Act, 1936, applies, is irrelevant in construing s. 156, sub-s. 1 of the Housing Act, 1936. Nor in my opinion is any help in construing head (*a*) of s. 156, sub-s. 1, derived from the other heads included in that sub-section, for those heads deal with subject matters entirely different from the subject matter which is comprehended within the head (*a*).

The point at issue, therefore, lies within a narrow compass. The respondents contend that in requiring possession of the houses for the purpose of putting themselves in a position to let the houses to some members of the working classes to be selected by them, they required possession " for the purpose of " enabling them to exercise their powers under an enactment " relating to the housing of the working classes." The enactment relied on is the Housing Act, 1936, and sub-s. 1 of s. 83 of that Act is rested on as containing the power. That subsection provides as follows : " The general management, " regulation and control of houses provided by a local authority " under this Part of this Act shall be vested in and exercised " by the authority." The houses in question were in fact provided under the Housing of the Working Classes Act, 1890, but the effect of s. 189, sub-s. 2 of the Housing Act, 1936, is that the houses so provided fall within the application of the phrase " houses provided by a local authority under this Part " of this Act."

The appellants contended that in seeking to secure possession the respondents were not exercising a power but were merely taking a step referable to their ownership of the properties ; and that s. 83, sub-s. 1, did not confer a power in the sense in which that word was used in s. 156 ; and that an adequate content could be given to head (*a*) of s. 156, sub-s. 1, by reason of its applicability to the case in which it was sought to obtain possession of a house which had been compulsorily acquired under the Housing Acts. The last point may I think be summarily disposed of.

I am content to assume—I do not express an opinion one way or another—that the appellants are right in their submission that even if the tenancy interest as well as the reversion had been compulsorily acquired under the Housing Acts, the Rent Restriction Acts would, apart from s. 156, preclude the acquiring local authority from recovering possession from the tenant. But the fact that the provision is necessary to meet one set of circumstances is no bar to a construction which admits its application to other cases.

My Lords, the local authority, having acquired the houses for the purposes of housing the working classes, are bound to see that the houses are used for that and for no other purpose. That I think remains their statutory duty unless and until the houses are sold under an exercise of statutory powers. The selection of tenants qualified to occupy the houses is unquestionably an act of management and the exercise of a power. But in light of the limitation as to the area of selection, the exercise of the power cannot be referable merely to the ownership of the local authority: it is also referable to their duty. It may not indeed have been necessary by express words to vest management in the local authority, but the Act has in terms stated that the management shall be vested in and exercised by the local authority. Clearer words could not be used to state and give a power, and in my opinion a power, related to the duty to select, was thereby given.

Two other points were preferred by the appellants. First it was said that s. 83 does not appear in the fasciculus of sections in Part V headed "General Powers and Duties of Local "Authorities." That is true, but, in my opinion, of no weight. A heading to one group of sections cannot alter the meaning of a section outside the group. Further the reference in s. 156, sub-s. 1, is not to powers under the Housing Act, 1936, but to powers under any enactment relating to the housing of the working classes. It cannot, therefore, be said that this was a reference to a particular group of sections labelled "Powers" contained in the Housing Act, 1936.

Second, it is said that the result of acceding to the respondents contention is that the rents chargeable as respects houses not excepted under s. 3, sub-s. 2 (*c*) of the Rent and Mortgage Interest Restrictions Act, 1939, are controlled by the Rent and Mortgage Interest Restrictions Acts while the right to possession is not and that an anomalous position is created. That is not, I think, in any event an argument of great weight. But it may be pointed out that the legislature, while making provision in s. 85, sub-s. 5 of the Housing Act, 1936, as to the rents chargeable as respects (inter alia) the excepted houses by reference to local conditions, has made no provision as to the rents chargeable as respects houses not excepted. It may be

H. L. (E.)

1948

SHELLEY v. LONDON COUNTY COUNCIL.

HARCOURT v. SAME.

Lord Uthwatt.

that the view taken was that as regards the houses not excepted the Rent Restriction Acts did what was necessary.

I am, therefore, of the opinion that both houses were houses possession of which was required for the purpose of enabling the respondents to exercise a power under an enactment relating to the housing of the working classes.

The remaining question arises from the fact that pursuant to s. 156, sub-s. 2 of the Housing Act, 1936, the respondents sought an order for the recovery of possession under the Small Tenements Recovery Act, 1838. It was argued by the appellants that the Act of 1838 upon its true construction gave to the court, though satisfied that the applicant before them had duly proved his case, a discretion to refuse to issue a warrant for possession. The appellants' argument was based upon the language of s. 1, which so far as relevant provides as follows: ". . . . and if the tenant or occupier shall not "thereupon appear . . . . and show to the satisfaction of the "justices hereinafter mentioned reasonable cause why "possession should not be given under the provisions of this "Act . . . . it shall be lawful for the justices . . . . to issue "a warrant" for possession.

In construing this provision due weight must be given to the phrase "under the provisions of this Act." In my opinion the only discretion given by this provision when properly construed is a discretion to decline to exercise jurisdiction under the Act when for good reason it is satisfied that the case ought not to be heard under the Act at all. In that event the complainant must resort to the jurisdiction which in 1838 existed and still exists in other courts. The clear purpose of this Act in conferring jurisdiction on the justices sitting in petty sessions was to set up a summary procedure available when possession of properties of small value was sought. But complicated questions can as readily arise in the case of properties of little value as in the case of properties of large value and justices might well take the view that they were ill-equipped for decision of such questions. That I think gives an intelligible reason for the provision. I would only add that an Act creating a new jurisdiction to hear a certain type of case should not lightly be construed as authorizing the withholding of a remedy in a case properly brought before it, when in other courts, to which resort might equally well be had, the remedy would follow as of course. I would dismiss the appeals.

H. L. (E.)

1948

SHELLEY
v.
LONDON
COUNTY
COUNCIL.
HARCOURT
v.
SAME.

LORD DU PARCQ. My Lords, I regret that I am unable to concur in the decision at which the majority of the Appellate Committee have arrived. In my opinion these appeals should be allowed.

The question on which I find myself in disagreement with my noble and learned friends is purely one of construction, and it is desirable to approach it, I think, without any preconceived view as to the policy of the legislature. Lord Greene M.R., in his judgment, truly observed (1) that considerations " of " that kind," that is to say what may be called, I think, political considerations, " do not afford an answer by themselves " to the question which we have to determine." He was, if I may say so respectfully, on less firm ground when he added that " they merely affect the approach to the problem." I would agree, of course, that a court is often entitled to reject a possible construction of ambiguous words if it would result in absurdity or manifest injustice, and the learned Master of the Rolls was fully entitled to say that the construction which he approved was not unreasonable. This fact by itself does not help us, however, unless the competing construction can be said to be unreasonable. Now, I am very willing to concede that Parliament may have intended to give great and almost unique powers as landlords to local authorities performing their statutory duties under the Housing Acts on the ground (I quote the words of the Master of the Rolls (1)) that " they may be " trusted . . . . to exercise their powers in a public-spirited " and fair way in the general public interest." It is, however, I think, no less possible that Parliament may have thought that all tenants, even those who, being members of what is called the " working class," are given the privilege of occupying their houses as tenants of a local authority, should have the same security of tenure. The respondent council claims to be entitled to give notice to tenants who enjoy the benefits of a Housing Act without assigning any reason for doing so, and to eject them as of right if they refuse to give up possession of their dwellings. That Parliament should have intended to arm local authorities with this power is not impossible, but neither is it so manifestly probable that a court, if doubt as to the true construction exists, should favour an interpretation which assumes such an intention. If the question is approached, as I think it ought to be, without any preconception as to the probable intention of the legislature, the weight of the argument

(1) [1948] 1 K. B. 274, 283.

seems to me to be in favour of the construction for which the appellants contend.

It is not in doubt that the Acts to which it is convenient, if inaccurate, to refer as the Rent Acts are of general application in the sense that they apply to all houses within the limits specified in them except in so far as the Rent Acts themselves, or other legislation, create exceptions. One relevant exception is contained in s. 3, sub-s. 2 of the Act of 1939, the effect of which is that the principal Acts apply to some of the houses provided under the Housing Act, 1936, but not to all of them. The houses with which your Lordships are here concerned are not within this exception, and the respondents do not claim to be entitled to increase the rents payable by the tenants beyond the standard rent. I pause to point out that it is common ground that, although (under s. 83, sub-s. 1 of the Housing Act, 1936) local authorities are empowered to " make such reasonable " charges for the tenancy or occupation of the houses as they " may determine," they must exercise this power with due regard to the Rent Acts when the houses in question are not excepted from the provisions of those Acts.

The crucial question can be shortly stated. " The general " management, regulation and control " of houses provided under the Housing Acts is " vested in " and to be " exercised " by " the authority. It is later provided that the Rent Acts are not to apply, so far as the recovery of possession is concerned where possession " is required for the purpose of enabling a " local authority to exercise their powers under any enact- " ment relating to the housing of the working classes." Does it follow that the Rent Acts have no application when the local authority seeks to determine the tenancy of a house provided under the Housing Acts ?

It is said that the answer to this question must be Yes, because the local authority cannot be said to be exercising the " power " of " general management, regulation and control " of a house if it is fettered by the Rent Acts so far as concerns recovery of possession. The last qualifying words of the sentence are necessary, because, as appears from what I have said already, Parliament has accepted the view that " general " management, regulation and control," may be exercised by a landlord even though he cannot himself fix the rent which he considers a fair or economic one. My Lords, I think it reasonable to say that, notwithstanding the Rent Acts, the ordinary unprivileged landlord does still exercise the " general

" management, regulation and control " of the house which he lets. Both Acts of Parliament and the common law restrict in more ways than one a landlord's right to recover possession, but it cannot be said, in my opinion, that no landlord exercises these general " powers," as in deference to the argument I will call them, unless he is liberated from all legal, or at least all statutory, control. The learned Master of the Rolls said that the argument which appeals to me would result in this, that the management of these properties " would be shared, in effect, " between the council and the county court judge " (1). Many a landlord may have made a similar comment in a moment of bitterness, but it cannot be said, I think, as a matter of law, or as a guiding rule of construction, that the Rent Acts have taken away from landlords the right, or the power, of general management of their property. If I may take by way of illustration a case familiar to some of your Lordships, I believe that most people would say that the Inns of Court exercise the general management, regulation and control of the whole of their property, even though as to much of it their control is, I believe, subject to the Rent Acts.

If the material part of the section, as the respondents construe it, is written out in full it will read : " Nothing in the " Rent Acts shall be deemed to prevent possession being " obtained of any house possession of which is required for the " purpose of enabling a local authority to exercise the power of " exercising the general management, etc.," of the houses in question. I do not think that the natural meaning of this cumbrous and periphrastic sentence would be such as to arm the county council with the power which it seeks. If I am right in my opinion that a landlord exercises the general management, regulation and control of his property although it is subject to the Rent Acts, it seems to me to follow that a local authority cannot be said to require possession of a house for the purpose of enabling it to exercise its powers under the Housing Acts when it already owns the house and has let it in proper performance of its duty under those Acts. It is already exercising the power of " general management, regulation and " control " in respect of that very house.

It would have been easy for Parliament to say, if it so intended, that the Rent Acts should not apply in any case where a local authority was seeking to recover possession from a tenant of a house provided and let in pursuance of the Housing

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(1) [1948] 1 K. B. 274, 287, 288.

Acts. Parliament has not said so in terms, and I am by no means satisfied that Parliament was minded to say so. So far as this consolidating Act is concerned it is more likely that the legislature intended s. 156, sub-s. 1 (*a*), to be read as referring to the powers mentioned in the group of sections beginning with s. 71, to which the attention of the reader would normally be directed.

My Lords, it is on these grounds that I am for allowing these appeals, and I am happy to find some support for my view in the doubts which were expressed by the learned judges in the Divisional Court, who might well have come to a different conclusion had they not been bound by authority.

LORD MORTON OF HENRYTON. My Lords, each of the appellants occupied a dwelling as tenant of the respondents. Each tenancy has been duly determined by a notice to quit which has expired. Each of the appellants was duly served with a notice of the intention of the respondents to apply to the court for possession under s. 1 of the Small Tenements Recovery Act, 1838, the provisions whereof were fully complied with by the respondents. If the appellants' main contention, which I am about to mention, is unsound, there can be no doubt that the respondents were and are entitled, in each case, to the issue of a warrant for delivery of possession. In regard to the " subsidiary points " mentioned in the judgment of the Master of the Rolls (1), I need only say that I agree entirely with the views which he has expressed upon each of them. I also agree with his conclusion upon the appellants' main contention, but as the point is of general importance I shall state my opinion briefly in my own words.

The appellants contend that they are protected by the Rent and Mortgage Interest Restrictions Acts. Section 156, sub-s. 1, of the Housing Act, 1936, provides : " Nothing in the Rent and " Mortgage Interest Restrictions Acts, 1920 to 1933, as amended " by any subsequent enactment shall be deemed to . . . . " prevent possession being obtained (*a*) of any house possession " of which is required for the purpose of enabling a local " authority to exercise their powers under any enactment " relating to the housing of the working classes. . . . ." I have omitted certain words, relating to obtaining possession of a house with respect to which a demolition order or a clearance order has been made, as these words are wholly irrelevant for the present purpose. Thus, the only question remaining for consideration is—do the respondents require possession of the dwellings in question for the purpose of enabling them to exercise their powers under any enactment relating to the housing of the working classes? In my opinion they do. The Housing Act, 1936, is clearly an enactment relating to the housing of the working classes, and the respondents require possession for the purpose of enabling them to exercise the powers conferred by s. 83, sub-s. 1 of that Act in the following terms: "The general management, regulation, "and control of houses provided by a local authority under this "Part of this Act shall be vested in and exercised by the "authority . . . ." I cannot doubt that the power to manage, regulate and control houses is a "power under an "enactment" within the meaning of s. 156, sub-s. 1 (*a*). The dwellings in question were erected long before 1936, but by reason of s. 189, sub-s. 2, of the Housing Act, 1936, they come within the class of houses mentioned in s. 83, sub-s. 1. If the respondents get possession of these dwellings they are "enabled" to manage, regulate and control them, and they require possession for this purpose. I do not see how the council can "manage, regulate and control" houses unless they are in a position effectively to give notice to one tenant and substitute another tenant.

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(1) [1948] 1 K. B. 274, 287, 288.

Thus, as it seems to me, the present case comes completely within the words of s. 156, sub-s. 1 (*a*) of the Housing Act, 1936, and the Rent and Mortgage Interest Restrictions Acts afford no protection to the appellants against an order for possession. In my view these appeals should be dismissed.

Appeals dismissed.

Solicitors for appellants: *Hewitt, Woollacott & Chown, and Geoffrey B. Gush & Co.*

Solicitor for respondents: *J. H. Pawlyn.*

H. L. (E.)*

1948

June 8, 9, 11, 14, 15, 16, 17; Nov. 9.

[HOUSE OF LORDS]

TANKEXPRESS A/S . . . . APPELLANTS;

AND

COMPAGNIE FINANCIÈRE BELGE DES PETROLES S.A. . . RESPONDENTS.

(THE PETROFINA.)

Shipping — Time charterparty — Hire — Non-payment — Right of withdrawal.

By a charterparty made in 1937 the owners of a tank vessel, a Norwegian company, let it to the charterers, a Belgian company, for seven years on terms that payment of the hire should be "in "cash, monthly, in advance, in London" and that "in default of "such payment the owners shall have the faculty of withdrawing "the said vessel from the service of the charterers," the hire being normally due on the twenty-seventh of each month, but despite the express terms, the accepted method of payment between the parties was for the charterers to send a cheque in favour of a London bank to be placed to the credit of the owners with an Oslo bank, and the hire was regularly paid in that way during the currency of the charter. After the outbreak of war on September 3, 1939, the charterers, in accordance with the accepted method previously adopted, posted in Brussels on September 25, 1939, a cheque for the amount of the hire but, owing to delay occasioned by the state of war, this was not delivered till October 3, 1939. On the ground of non-payment of the hire, the owners on September 30, 1939, purported to cancel the charterparty and withdrew the vessel from the service of the charterers.

Held that when payment on a due date is required and is not excused under the terms of the contract by special circumstances, payment a few days late is not timeous enough and no element of deliberate non-performance or negligence is necessary to constitute default, but in the present case the right of withdrawal only arose if the charterers were in default and, having paid in the accepted way, they were not in default; the owners could at any time have insisted on strict performance thereafter of the contract but they were not entitled to vary the accepted method of performance without due notice to enable the charterers to perform the contract in the manner demanded.

Dictum of Bigham J. in *Nova Scotia Steel Co., Ld.* v. *Sutherland Steam Shipping Co., Ld.* (1899) 5 Com. Cas. 106, 109, disapproved.

Decision of the Court of Appeal affirmed.

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* *Present:* LORD PORTER, LORD WRIGHT, LORD UTHWATT, LORD DU PARCQ and LORD MORTON OF HENRYTON.

H. L. (E.)

1948

TANK-
EXPRESS
A/S
v.
COMPAGNIE
FINANCIÈRE
BELGE
DES
PETROLES
S.A.

APPEAL from the Court of Appeal (Bucknill L.J., Tucker L.J. dissenting).

By a charterparty dated March 18, 1937, A/S Tankexpress of Oslo, the owners of the Norwegian tank vessel *Petrofina*, let her to Compagnie Financière Belge des Petroles S.A. of Brussels. By cl. 6: "The said owners agree to let and the "said charterers agree to hire the said vessel for a period of "seven years one month more or less at charterers' option" and the vessel was to be delivered by the owners at or off the builders' yard. By cl. 10 it was provided that "the charterers "shall pay for the use and hire of the said vessel at the rate "of 5*s.* 6*d.* per ton of 20 cwt. on vessel's total d.w. capacity ". . . . commencing on and from the day of her delivery as "aforesaid at and after the same rate for any part of a month. "The hire is to continue until the hour of her re-delivery to "owners." By cl. 11: "Payment of the said hire is to be as "follows: In cash, monthly, in advance, in London. In "default of such payment the owners shall have the faculty "of withdrawing the said vessel from the service of the "charterers . . . ." By cl. 13: "The whole reach of the "vessel's holds, decks, burthen and passenger accommodation, "if any . . . . shall be at the charterers' disposal . . . ." By cl. 14: "The captain shall prosecute his voyages with "the utmost dispatch . . . ." By cl. 16: "The captain "(although appointed by the owners) shall be under the "orders and direction of the charterers, as regards employment, "agency or other arrangements . . . ." In cl. 24 there were the usual provisions for the case where payment of hire fell due when the vessel was on her way to the port of re-delivery. In cl. 25 there were the usual provisions for the event of loss of the vessel. By cl. 27: "In the event of loss of time through "deficiency of men or stores, repairs, breakdown of machinery "or boilers (whether partial or otherwise), collision or stranding, "or damage preventing the efficient working of the vessel for "more than 48 running hours, or breach of orders or neglect "of duty on the part of the captain causing delay, the payment "of hire shall cease from the commencement of such loss of "time until she be again in an efficient state to resume her "service; and should the vessel from any of the afore-"mentioned causes, put into any other ports than those "to which she is bound under the instructions of the charterers, "the port charges, pilotages, and other expenses at those ports, "loss of time consequent upon putting in, shall be borne by the "owners; also should the vessel put back while on "voyage, by reason of any accident, the hire shall be suspended "from the time of her putting back until she is again in the "same position and the voyage resumed therefrom; but "should the vessel be driven into port or to anchorage by "stress of weather, such detention or loss of time shall be "at the charterers' risk and expense. In the event "of detention of the vessel by authorities at home or "abroad in consequence of legal action against the owners of "vessel, unless brought about by charterers, whereby the vessel "is rendered unavailable for charterers' service the charter "shall be suspended until the service can again be resumed. "In the event of the nation to which this vessel belongs "becoming engaged in hostilities, the hire to cease during the "continuance of such hostilities, if the charterers find it "impossible to employ the vessel in consequence. It is "agreed that all detention or loss of time provided for in "this clause and not paid for shall count as part of the "guaranteed time specified under this charter. All graving "dock charges to be at owners' expense. Time in and waiting "turn to enter graving dock not to count as on hire. In which "event owners are to have the right to employ the ship on their "own account." In cl. 34 there were the usual exceptions in favour of the owners. It ended: "Nothing in this clause "shall, however, limit the charterers' right to suspension of "hire for any period the vessel may not be at charterers' "disposal for a period exceeding 48 hours." By cl. 44: "Any disputes arising under this charter shall be settled in "London by arbitration, the owners and charterers each "appointing an arbitrator, and the two so chosen, if they do "not agree, shall appoint a third, the decision of whom shall "be final . . . ." The charterparty incorporated the Chamber of Shipping War Clause (cl. 45) and a special war clause (cl. 46) both of which made provision for the mutual obligations of the parties in the event of war breaking out during the currency of the charter but their contents were immaterial so far as the present case was concerned. Hire normally became due on the twenty-seventh of each month, that being the day of the month on which the vessel was delivered to the charterers. When war broke out on September 3, 1939, the vessel was in the neighbourhood of Venezuela expecting to load for the respondents a cargo of oil. A dispute having thereafter arisen between the parties, the matter was referred to arbitration under cl. 44 and a third arbitrator was appointed. In an award in the form of a special case, dated June 24, 1940, he found the following facts: "(1.) That the hire normally "became due on the twenty-seventh of each month. (2.) When "war broke out questions arose between the owners and the "charterers with regard to the voyage that the steamer then "intended to make and the owners declined to allow the vessel "to be at the charterers' disposal to load until this dispute "had been settled. This dispute was finally settled and "disposed of on September 25, 1939, on which date the vessel "was lying in Guiria Roadstead, Venezuela, in ballast, the "captain having received instructions from his owners not to "commence loading until instructed by them. (3.) The "dispute between the owners and the charterers was settled by "virtue of two telegrams both dated September 25, 1939. "On that date the owners telegraphed to the charterers as "follows: 'Yours Mejlaender we awaiting your telegraphic "'confirmation direct that *Petrofina* not to be sent to belligerent "'ports without our consent stop further understood we cover "'kroner 4½ million your account any delay caused at "'Venezuela not to be considered off hire stop we reserve "'right divert vessel safe ports if agreement discussed "'Copenhagen not reached telegraph' to which the charterers "on the same date, namely September 25, 1939, replied as "follows: 'Confirm *Petrofina* not to be sent to belligerent "'ports without your consent stop other terms your cable "all right stop please hurry dispatch.' On the same date "the owners telegraphed to the charterers: 'Yours yesterday "'instructed master commence loading for Lisbon' and the "owners on September 25, 1939, telegraphed to the master: "'Commence loading for Lisbon.' That cable never reached "the captain—it was addressed as follows: 'Master *Petrofina* "'c/o Stancoven Guiria'—with the result that the master "did not place his ship at the disposal of the charterers for "loading. (4.) The owners had been requested on September 17 'to cable the captain c/o Stancoven, Caripto, and they did "send one cable to the captain on September 19 so addressed "but all other cables sent to the captain were addressed "c/o Stancoven, Guiria, and with the exception of the cable of "September 25, 1939, reached the captain safely. The cable "of September 25, 1939, from the owners to the captain "authorizing him to commence loading appears, by some "unexplained reason, to have reached the charterers' agent at

H. L. (E.)

1948

TANK-EXPRESS A/S v. COMPAGNIE FINANCIÈRE BELGE DES PETROLES S.A.

"La Guaira and not at Guiria and he, thinking it related to a "vessel that was to load there and which vessel had not "arrived did nothing about it. (5.) On September 25, the "charterers wrote and despatched from Brussels a letter to "Hambro's Bank, Ld., London, enclosing a cheque for "3,766*l.* 13*s.* 0*d.* being the agreed net amount due for the "month's hire in advance from September 27, 1939, to "October 26, 1939, and on the same date the charterers wrote "to the owners at Oslo and to the owners' brokers in Paris "informing them of the despatch of the cheque to Hambro's "Bank with a statement how the cheque was made up. This "was in accordance with the procedure previously adopted in "remitting the hire. The letter to Hambro's Bank, Ld. "with the cheque was not received by Hambro's Bank until "October 3. On September 29 the Kristiana Folkebank "telegraphed to Hambro's Bank, London, as follows: 'Have "'you received *Petrofina* hire from Compagnie Financière "'please telegraph yes or no eventually stating amount' "to which Hambro's Bank on the following day September 30 "wired: 'Yours yesterday cannot trace receipt of hire "'*Petrofina*.' The contents of this telegram were conveyed "to the owners and they on the same date telegraphed to the "charterers: 'Accordance telegram received from Hambro's "'Bank to-day hire not received consequently consider charter-"'party cancelled' and on the same date they cabled to the "captain: 'C/o Stancoven Guiria. Hire not paid stop "'loading await instructions acknowledge' and that telegram "was received by the master on September 30. The charterers "disputed the right of the owners to cancel the charter by the "telegram they sent to them on October 2 as follows: 'Cannot "'understand your telegram payment hire having been made "'as usual according to our letter 25th stop hold you "'responsible for all eventual damage.' (6.) The owners "maintained their right to cancel the charter and on October 6 "chartered her for their own account. The remittance sent "by the charterers to Hambro's Bank was returned by the "bank to the charterers, the owners adhering to the position "that they had taken up that the charter was cancelled. The "reason why Hambro's Bank did not receive the letter from "the charterers enclosing the hire until October 3, 1939, "arose owing to the delay in the post occasioned by the state "of war. (7.) The practice between the owners and the "charterers during the currency of the charterparty was for "the charterers to pay the hire on the 27th day of each month "deducting from the hire any amount for time off hire during "the currency of the preceding month. (8.) Both charterers "and owners were unaware of the fact that the owners had not "on October 3, 1939, when the hire was tendered placed the "vessel at the disposal of charterers owing to the fact that the "captain had not received the owners' cable of September 25, "1939. (9.) The accepted method between the parties, during "the currency of the charter, with regard to the payment of "hire had been for the charterers to make the payment of hire "in London at the office of Hambro's Bank, Ld. by sending a "cheque in favour of Hambro's Bank, Ld. (drawn on the "Italo-Belgian Bank, Ld. of London) to be placed by them "to the credit of the owners with the Kristiana Folkebank, "Oslo, and the payment of hire had been regularly and properly "paid in this way during the currency of the charter and had "always been paid on its due date until this payment of the "hire due on September 27." The questions for the consideration of the court were: "A. Whether the charterers "were in default in not paying the hire having regard to the "fact that the owners had instructed the captain not to proceed "with the loading until authorized by them and that in fact "the captain had not received instructions to load at the time "the hire was tendered, viz., on October 3, 1939. B. Whether "on the facts stated the owners had the right on September 30, "1939 . . . . to cancel the charterparty. C. Whether on "the facts stated and on the assumption the hire became due "on September 27, notwithstanding the fact that the captain "had not received the owners' instructions to load, the "charterers were excused from paying the hire on September 29 "owing to the fact that the charterers' letter of September 25 "was delayed in the post." (It was common ground that "September 29" must be read as "September 27.") On these facts and findings the arbitrator, subject to the case stated, found that the owners were entitled to withdraw the vessel. This award was set aside by Atkinson J., who upheld the alternative award in favour of the charterers. From his decision an appeal was taken to the Court of Appeal which, owing to the illness of Scott L.J., consisted of two Lords Justices and, they being divided in opinion, the judgment of Atkinson J. was affirmed. The owners appealed to the House of Lords.

Le Quesne K.C. and *Ashton Roskill* for the appellants, the ship owners. One month's hire in advance was due and payable on September 27 and was not paid. The time for which hire was to be paid under the charterparty ran without interruption until the termination of the charterparty, save in so far as was otherwise specifically provided by the terms thereof. The obligation of the charterers to pay the stipulated hire for one month in advance on September 27, 1939, (less any sum representing time in the previous month during which the ship was off hire) had not ceased or been suspended under any clause of the charterparty. Whether or not the ship was at the charterers' disposal, they were bound to pay a month's hire in advance, for the obligations were not concurrent. It was intended that the hire should be paid regularly and on a due day. The amount due as hire is always certain and an element of uncertainty is introduced if the charterers' contentions be accepted. It would undermine the stipulation as to payment in advance on a due day. Nothing in cl. 27 authorizes the cessation of payment of hire. The context in which the words "the payment of hire shall cease" occur would in itself be ground for refusing to support the charterers' construction of the clause. The phrase is directed only to the computation of the amount of the monthly instalments payable. It does not mean that during the specified period the charterers are entitled to decline to pay the hire. This is supported by other expressions used in cl. 27: "loss of time . . . . shall be borne by the "owners," "the hire shall be suspended," "such detention and "loss of time shall be at the charterers' risk and expense," "the "charter shall be suspended," "the hire to cease," time in graving dock "not to count as on hire." If cl. 27 had the meaning attributed to it by the charterers it would create a possible clash with cl. 10 and cl. 11. If that meaning had been intended, the matter would have been covered by clear provision. Throughout, cl. 27 is dealing with the case of pre-paid hire and its provisions apply to the repayment of hire paid in advance. For the charterers to succeed they must establish that cl. 27 can be construed so as to justify the withholding of hire due in advance on a due date and also that it applies on the facts of this case. None of the necessary events enumerated in cl. 27 has happened here and no words are to be found in it which satisfy the facts of the present case, with the possible exception of the phrase "breach "of orders." Unless it is provided that default on the part of the shipowner will excuse the obligation to pay hire in advance

H. L. (E.)

1948

Tankexpress A/S v. Compagnie Financière Belge des Petroles S.A.

the charterer, in such a case as this, cannot escape the obligation. If, for example, the charterers take a ship knowing that their instructions to the owners will have to be forwarded by the owners and the charterparty does not provide that in the event of delay in the transmission of a cable forwarding such instructions they will not have to pay hire, then their obligation to pay will continue even in the event of delay. If there was a right to withhold payment on the due date because the vessel was not then carrying out the charterparty, it would be express and not implied. As long as the charterparty stands and has not been repudiated the shipowners are entitled to the hire. In this case the shipowners were not in default, for the ship was never withdrawn from service within the meaning of cl. 11. But even if there had been a default on their part that would not affect their rights to payment in advance and under no principle of law would they be prevented from enforcing them against the charterers. Even if there were a breach, some regard must be had to the scope and degree of the breach in not putting the ship at the charterers' disposal. The action of the shipowners was not deliberate and was not due to unwillingness. It was a mere delay in transmission. At worst it was only a partial breach, a matter of five days in a seven years' contract. In any event, the charterers cannot go behind the settlement of the dispute on September 25, 1939; thereafter they were not entitled to allege that up till then there had been default on the part of the shipowners. The shipowners' contentions are supported by *French Marine* v. *Compagnie Napolitaine d'Eclairage et de Chauffage par le Gaz* (1) in the House of Lords (including the judgment of Scrutton L.J. in the Court of Appeal (2)) and *Italian State Railways* v. *Mavrogordatos* (3). See also *C. A. Stewart & Co.* v. *Phs. Van Ommeren (London), Ld.* (4); *Giertsen* v. *George V. Turnbull & Co.* (5); *Aktieselskaber "Lina"* v. *George V. Turnbull & Co.* (6); *Livock* v. *Pearson Brothers* (7); *Tonnelier* v. *Smith* (8); *Modern Transport Co., Ld.* v. *Duneric Steamship Co.* (9); *Havelock* v. *Geddes* (10); *Dawson* v. *Dyer* (11); *Edge* v. *Boileau* (12); *Briant* v. *Pilcher* (13); *Bastin* v.

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(1) [1921] 2 A. C. 494.

(2) (1920) Appendix to Printed Case, p. 22.

(3) [1919] 2 K. B. 305, 313–4.

(4) [1918] 2 K. B. 560.

(5) 1908 S. C. 1110, 1111.

(6) 1907 S. C. 506.

(7) (1928) 33 Com. Cas. 188; 193.

(8) (1879) 77 L. T. 277.

(9) [1917] 1 K. B. 370.

(10) (1809) 10 East. 555.

(11) (1833) 5 B. & Ad. 584, 587.

(12) (1885) 16 Q. B. D. 117.

(13) (1855) 16 C. B. 354.

H. L. (E.)

1948

TANK-EXPRESS A/S *v.* COMPAGNIE FINANCIÈRE BELGE DES PETROLES S.A.

Bidwell (1); *The Europa* (2); *Kish* v. *Charles Taylor, Sons & Co.* (3); *The Christel Vinnen* (4); *Maple Flock Co., Ld.* v. *Universal Furniture Products (Wembley), Ld.* (5); *Sea and Land Securities, Ld.* v. *William Dickinson & Co., Ld.* (6); Abbott's Law of Merchant Ships and Seamen (14th ed.), p. 679; Maude & Pollock's Merchant Shipping (4th ed.), vol. 1, p. 378; Carver on Carriage of Goods by Sea (8th ed.), p. 797, s. 572; Anson's Law of Contract (19th ed.), p. 334. Since the charterparty requires payment on a specific date, with the right of withdrawal of the ship if payment is not made on that date and the charterers failed to pay on that date, the ship was rightly withdrawn. Nothing less than receipt of the cheque in London constituted payment. Merely sending the cheque was not the equivalent of payment. The "accepted "method," as set out by the arbitrator, should not be construed too literally. What he said was mere narrative not intended to convey that the shipowners had consented to the modification of any of their contractual rights. The use of the word "sending" should not be unduly stressed. The payment was in fact always made on the due date, until the one now in question, and it was an essential condition of the accepted method that the cheque should not reach London later than that date. The fact that on this occasion the charterers carried out their part in the way usually adopted is irrelevant. Further, on the facts found, there is no ground for the application of the equitable principle enunciated in *Hughes* v. *Metropolitan Ry. Co.* (7) or for the implication in the charterparty or the settlement of a term that the shipowners would not enforce their contractual rights under the charterparty. The charterers were not entitled to latitude as to the time of payment of hire. *Nova Scotia Steel Co., Ld.* v. *Sutherland Steam Shipping Co., Ld.* (8) is not authority for allowing latitude in payment beyond the due date. This case and *Tyrer & Co.* v. *Hassler & Co.* (9) are relied on in the text-books only on the question of waiver: see Carver on Carriage of Goods by Sea (4th ed.) (1905), p. 892 and Scrutton on Charterparties (5th ed.) (1904), pp. 289–90, art. 146 and subsequent editions. See also *Wehner*

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(1) (1881) 18 Ch. D. 238, 245.

(2) [1908] P. 84.

(3) [1912] A. C. 604, 615–6.

(4) [1924] P. 61, 208.

(5) [1934] 1 K. B. 148, 157.

(6) [1942] 1 K. B. 286; [1942] 2 K. B. 65.

(7) (1877) 2 App. Cas. 439, 448.

(8) (1899) 5 Com. Cas. 106.

(9) (1901) 6 Com. Cas. 143, 146.

v. *Dene Steam Shipping Co.* (1) and *Maclaine* v. *Gatty* (2).

Ashton Roskill following. As to the alleged "accepted "method" of payment, one must have regard to the express obligations imposed on the charterers by cl. 11. Their obligation is to search out their creditors and pay them in London. This view is supported by the facts found by the arbitrator: see paras. 7 and 9. The onus is on the charterers to establish that they are entitled to withhold the hire payable on the due date and this they have not discharged. As to the cable of September 25 which the captain did not receive, see para. 4. The shipowners were not at fault, for it was the reasonable course for them to address their communications to the place where the ship in fact was.

Sir William McNair K.C. and *Eustace Roskill* for the respondents, the charterers. The facts and the charterparty should be examined so that they may be brought into relation with the contractual position. Inasmuch as the charterers paid by the "accepted method" they were never in default, even though the cheque did not in fact reach its destination on the due date. There should be read into cl. 11 of the charterparty the findings of the arbitrator (para. 9) as to the "accepted "method" of payment. Those words should be read in their strict meaning; the arbitrator who used them was an experienced solicitor, who would not employ loose expressions. Since the shipowners are relying on a forfeiture clause, it must be construed strictly against them and the charterers are entitled to the benefit of any ambiguity, e.g., the word "sending" in para. 9 might mean sending so that it is received on the due date or simply sending by post: see Lord Mansfield C.J. in *Walter Goodright d.* v. *Davids* (3) and Lord Loreburn L.C. in *Nelson Line* (*Liverpool*) v. *James Nelson & Sons, Ld.* (4). Even assuming that the charterers' obligation was to place a cheque in the hands of the bankers in London on the due date, the shipowners were themselves in default up to September 30 in withholding the services of the ship and so, on that date, were not in a position to cancel or rescind the charterparty, since no hire was then due. That withholding itself amounted to a renunciation of the charterparty. The obligation of the charterers to pay hire in advance was dependent and conditional on the fulfilment by the shipowners of their obligation to place the ship at their disposal

(1) [1905] 2 K. B. 93, 101.
(2) [1921] 1 A. C. 376, 381–2.
(3) (1778) 2 Cowp. 803, 805.
(4) [1908] A. C. 16, 20.

unless prevented (which they were not) by law or by matters covered by the express exceptions of the charterparty. The hire is not payable when the ship is withdrawn because the shipowners are not in a position to aver that they are fulfilling their obligation of putting the ship at the charterer's disposal. Where a contract, on its true construction, contains mutual and concurrent obligations one party cannot sue the other unless he is able to aver and prove that he is performing or has performed his obligations or that he is ready and willing by himself or his servants to perform them. When the contractual promises go to the whole consideration on both sides they are mutual conditions and performance must be averred and when the two acts are to be done at the same time neither party can maintain an action against the other without averring performance or an offer of performance: see Smith's Leading Cases (13th ed.), vol. 2, pp. 9, 18. On this charterparty it is plain that the sole consideration for the hire was the placing of the ship at the charterers' disposal and the failure of consideration was one which amounted to a total failure to perform the contract. In maintaining that the hire is not payable, the charterers are relying not on any implied term but on the ordinary principles of law: see *Fibrosa Spolka Akeyjna* v. *Fairbairn, Lawson, Combe, Barbour, Ld.* (1). The test of sole consideration is to be applied to see whether the obligations are concurrent and mutually dependent and if A.'s breach consists of failure to perform a mutual and concurrent obligation B. is excused performance until that breach is remedied. The shipowners relied on *Dawson* v. *Dyer* (2) and *Edge* v. *Boileau* (3) to suggest the proposition that the payment of rent and the giving of possession are not mutual and concurrent obligations. But these cases are irrelevant here because the sole consideration for rent is not the giving of possession but the granting of an estate in the land. When a contract is subject to a condition by which one party can rescind it in certain circumstances the court will not let him do so if at the time he is in breach of any duty or contractual obligation or if it does not consider rescission just and reasonable. As to the cable which failed to reach the master, if it was merely the forwarding by the shipowners of the charterers' instructions, the shipowners, having been requested to telegraph to one place and having in fact telegraphed to another, cannot rely on the failure of the cable to reach its

(1) [1943] A. C. 33, 46, 47.
(2) 5 B. & Ad. 584.
(3) 16 Q. B. D. 117.

destination or contend that they have followed the charterers' instructions. [They referred to *In re Jackson and Haden's Contract* (1); *Admiral Shipping Co., Ld.* v. *Weidner, Hopkins & Co.* (2); *Modern Transport Co., Ld.* v. *Duneric Steamship Co.* (3); *Wehner* v. *Dene Steam Shipping Co.* (4); *French Marine* v. *Compagnie Napolitaine d'Eclairage et de Chauffage par le Gaz* (5); *Havelock* v. *Geddes* (6) and *Kish* v. *Charles Taylor, Sons & Co.* (7).] Even if the shipowners are not debarred from exercising their right of cancellation by the fact that they were not rendering the services contracted for, there was in fact no default on the part of the charterers. "Default" in cl. 11 of the charterparty imports a deliberate or culpable act and does not cover an accidental omission (though without legal excuse) such as this, for which the charterers were not at all to blame: see *Sea and Land Securities, Ld.* v. *William Dickinson & Co., Ld.* (8) and the definition of "default" in the Shorter Oxford English Dictionary, vol. 2. The phrase in cl. 11 is imprecise and capable of latitude in interpretation. Further, the charterers paid as near the date as their contract compelled them because a certain latitude is permissible, so that payment made a day or two after the due date does not constitute default: see *Nova Scotia Steel Co., Ld.* v. *Sutherland Steam Shipping Co., Ld.* (9); see also *Kawasaki Kisan Kabushiki Kaisha* v. *Bantham Steamship Co., Ld.* (10). The observations in *Maclaine* v. *Gatty* (11) are not to be taken as a reflection on *Nova Scotia Steel Co., Ld.* v. *Sutherland Steam Shipping Co., Ld.* (12) but merely as distinguishing it. Mere failure to pay on a particular day cannot normally justify cancellation of the contract because it is not normally of the essence of the contract. Further, a term must be implied into the settlement of September 25 that the charterers should be allowed a reasonable time after that date to effect payment in London in accordance with the accepted method of payment between the parties and such time had not elapsed when the shipowners purported to cancel the charterparty; a payment made in the ordinary course on the conclusion of the settlement must be in time. On account of the dispute, the date when the charterers in fact dispatched the cheque was the earliest that this could have been done because until then the amount was uncertain and it was not settled whether the negotiation period was to be treated as off-hire. Moreover, between September 25 and 27 the ship was off-hire under cl. 27 of the charterparty and accordingly the charterers' obligation to pay hire ceased: see Anson's Law of Contract (19th ed.), p. 352 and *Joseph Constantine Steamship Co., Ld.* v. *Imperial Smelting Corporation, Ld.* (1). Finally, in the circumstances of the case, it would be inequitable to allow the shipowners to withdraw the vessel and to invoke the forfeiture clause.

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(1) [1906] 1 Ch. 412.

(2) [1916] 1 K. B. 429; [1917] 1 K. B. 222.

(3) [1917] 1 K. B. 370.

(4) (1905) 10 Com. Cas. 139, 157.

(5) [1921] 2 A. C. 494.

(6) 10 East. 555.

(7) [1912] A. C. 604.

(8) [1942] 1 K. B. 286, 290.

(9) 5 Com. Cas. 106, 109.

(10) [1938] 1 K. B. 805.

(11) [1921] 1 A. C. 376, 385.

(12) 5 Com. Cas. 106.

Le Quesne K.C. in reply. Hire continued payable on the due date throughout the time of the charterparty. *French Marine* v. *Compagnie Napolitaine d'Eclairage et de Chauffage par le Gaz* (2) is authority for this and Lord Dunedin (3) was not seeking to lay down any contrary proposition; he was concerned only with procedure. When payment was not made on the due date the shipowners had the right to cancel the charterparty. As to *Wehner* v. *Dene Steam Shipping Co.* (4), it is not proper to rely on the passage which Channell J. omitted from the Law Reports version of the judgment. [He also referred to *Admiral Shipping Co., Ld.* v. *Duneric Steamship Co.* (5); *Havelock* v. *Geddes* (6) and *C. A. Stewart & Co.* v. *Phs. Van Ommeren (London), Ld.* (7).] As regards the alleged withholding of the services, performance or failure of performance is not a question of a day or so. There is here no total failure of consideration and the shipowners are not to be treated as not having put the ship at the charterers' disposal: see Halsbury's Laws of England (2nd ed.), vol. 7, pp. 224–5, s. 306. As to default in payment see *Tyrer & Co.* v. *Hessler & Co.* (8) where the relevant phrase was "in default of such "payment or payments as herein specified." As to the argument based on *Nova Scotia Steel Co., Ld.* v. *Sutherland Steam Shipping Co., Ld.* (9), the correctness of this decision has been doubted: see *Maclaine* v. *Gatty* (10). Though never overruled, it has never been acted on as a matter of business.

(1) [1942] A. C. 154.
(2) [1921] 2 A. C. 494.
(3) Ibid. 511.
(4) [1905] 2 K. B. 92, 101–2; 10 Com. Cas. 139, 157.
(5) [1916] 1 K. B. 429; [1917] 1 K. B. 222.
(6) 10 East. 555.
(7) [1918] 2 K. B. 560.
(8) 6 Com. Cas. 143; (1902) 7 Com. Cas. 166.
(9) 5 Com. Cas. 106.
(10) [1921] 1 A. C. 376, 385.

If it were acted on it would be hard to say where the latitude should stop. As to the argument based on "the accepted "method" of payment, the shipowners could not have demanded cash after having accepted by their conduct for a period of two years payment by cheque, but as regards place and date of payment there had been no such departure from the contractual obligation. The fact that the cheque, having been posted at a certain time, had always arrived on a due date, did not mean that if on some other occasion that method of posting did not work, the charterers were not to be treated as being in default. From the acceptance of payment by cheque one cannot infer waiver of the right to payment on the due date. There was no agreement that payment should be made by the posting of a cheque. No variation of the original agreement is found as a fact in the award and there are no facts from which such a variation could fairly be inferred. There is no reason or ground for any implication that it was agreed that the time for payment by receipt of the cheque in London should be extended: *Joseph Constantine Steamship Co., Ld.* v. *Imperial Smelting Co., Ld.* (1); see also *Luxor (Eastbourne), Ld.* v. *Cooper* (2). As to the argument based on the settlement of the dispute, neither the dispute nor its settlement had anything to do with the payment of the hire. Payment was not postponed by the negotiations since the charterers always knew what amount of hire was due. They would have paid less than the full hire at their peril; that is the effect of the agreement. To say that they could not or need not make a payment until it was decided whether the negotiation period was to be treated as off-hire would amount to a variation of the contract.

THE HOUSE took time for consideration.

Nov. 9. LORD PORTER. My Lords, the case for the appellants can be put in the simplest possible terms. The charterparty, they say, requires payment on a specific date, which, in the events which happened, is the twenty-seventh of each month, with the right of withdrawal of the ship if payment is not made on that date: the respondents failed to pay on the due date, and consequently the ship was rightly withdrawn. It matters not that the respondents carried out their part in

(1) [1942] A. C. 154, 185.
(2) [1941] A. C. 108.

the way usually adopted: their duty was to pay in London on the due date, and they have not done so.

The respondents put forward a number of arguments in answer to this claim. They say, first, that the right of withdrawal only arises if they are in default, and, having paid in the usual and recognized way, they are not in default, though in fact their cheque did not reach Hambro's Bank on the twenty-seventh of the month: secondly that, even assuming that their obligation was to place a cheque in the hands of Messrs. Hambro in London on that date, the appellants being themselves in default by withholding the services of the ship were not in a position to withdraw those services: thirdly, that default implies a deliberate act and does not include an accidental omission for which they were in no way to blame: fourthly, following the decision of Bigham J. in *Nova Scotia Steel Co., Ld.* v. *Sutherland Steam Shipping Co., Ld.* (1), they did pay as near the due date as their contract compelled, and finally that, in order to make the settlement of September 25 work, a term must be implied that a payment made in the ordinary course immediately upon its conclusion would be in time.

My Lords, it is a commonplace that the phraseology still adopted in the case of the charter of a ship where her services are put at the disposal of a charterer but she is not demised, is deceptive. The ship is not leased or withdrawn: her services and those of her crew are put at the disposal of the charterers when the charter begins, and when the withdrawal of the ship is spoken of it merely means that those services are no longer supplied. Consequently, so the charterers contend, the owners are prima facie in breach of their obligations if they withdraw those services, and in the present case there is no finding which excuses them.

My Lords, whichever party may be right in the dispute which took place at the end of September, I can find no provision in the charterparty which would entitle the owners to withhold the services of the ship, at any rate after it was settled on September 25. But the fact that they instructed the captain not to load does not necessarily absolve the charterers from the obligation to pay the advance hire on the stipulated date: it would only do so if the obligations of furnishing the ship and paying hire were mutually inter-dependent. It might be, and indeed was, I think, maintained on behalf of the charterers

(1) 5 Com. Cas. 106.

H. L. (E.)

1948

TANK-EXPRESS A/S v. COMPAGNIE FINANCIÈRE BELGE DES PETROLES S.A.

Lord Porter

that the owners did more than withhold their vessel temporarily and that in substance they renounced the charterparty and thereby excused the charterers from further performance until the dispute was cleared up and the mutual obligations of the charter were again resumed. I doubt, however, whether such a state of affairs has in fact been established and, even if it had, I doubt whether there is any half-way house between acceptance of the repudiation and continuance of the charter with the consequent obligation to continue to pay hire; but, having regard to my opinion on another aspect of the case, I do not think it necessary to reach a conclusion on this topic or upon the question whether the payment of hire and provision of the services of the ship are mutually dependent one upon the other. So too I do not think it necessary to come to a conclusion as to the analogous question whether the owners are precluded from withdrawing the ship whilst they are themselves in default, nor whether they are or are not entitled to sue for the hire so soon as the due date has been reached. The charterers contended that no hire was payable whilst the ship was not at their disposal and therefore not only was non-payment during such a period not a default, but that in any case during a time at which they were not given the services of the ship, the right of withdrawal ceased. As I have said I do not think it necessary to decide these questions and prefer not to pronounce upon them.

Two further arguments on behalf of the respondents are, I think, unsound. Default in my opinion means in this charterparty a failure without excuse to pay hire on the due date. Apart from some special circumstances excusing performance it is enough to constitute default that payment has not in fact been made: neither deliberate non-performance nor negligence in performing the contract is necessary. Nor do I think that, if payment on the due date was required and not excused by special circumstances, payment a day or two late was timeous enough. In my view *Nova Scotia Steel Co., Ld.* v. *Sutherland Steam Shipping Co., Ld.* (1) was wrongly decided so far as this point is concerned, and is none the less wrong though the provision in that case was not for payment simpliciter but for punctual and regular payment. Further, if the obligation to pay on the due date remained of full force under the terms of the charterparty, I should not myself imply a term in the settlement of September 25 that payment by letter of that date was enough. Certainly, if the owners are right in contending that even if the settlement had not been effected the charterers would have been under an obligation under all circumstances to pay the month's hire in advance and must do so however much the owners were in default or had broken their contract, I see no reason for implying such a term. But whether such contention be or be not maintained, I do not see why a dispute between the parties, even if it results in the temporary withdrawal of the ship, necessitates the implication that the charterers shall be excused from taking any steps towards implementing their obligation to pay until the dispute is settled. It is true that they could not be certain of the length of time the ship was off hire between August 27 and September 27 until an agreement had been reached, but they could still have paid the full sum and deducted from future hire whatever might ultimately be agreed to be deductible for the period during which the ship was off hire.

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(1) 5 Com. Cas. 106.

But, whatever view may be taken of these matters, I think that the respondents are entitled to succeed in their first contention. This result must follow, if it is to follow at all, from the findings of the arbitrator. He states them in cll. 5, 7 and 9 of the award. He says in cl. 5 that the charterers dispatched their cheque to Hambro's Bank in London from Brussels on September 25 and on the same day wrote to the owners at Oslo and their brokers in Paris of the dispatch of the cheque. All this, as he finds, was in accordance with the procedure which had previously been adopted ; the delay in delivery in London resulted from the outbreak of war. In cl. 7 he sets out the practice between owner and charterers during the currency of the charter under which hire was paid on the twenty-seventh of each month, but from the gross sum was deducted any reduction for time off hire during the previous month. Clause 9 sets out the method accepted by both parties for payment of hire, which was effected by sending a cheque in favour of Hambro's Bank to be placed by them to the credit of the owners. The arbitrator adds "the payment of hire "had been regularly and properly paid in this way during the "currency of the charter and had always been paid on its due "date until this payment . . . ." The last part of this sentence I take to mean that the cheque had always hitherto been received in London on the twenty-seventh of each month. In a contract between charterers and shipowners when the former are in Brussels, the latter in Oslo and their brokers in Paris, and when the contract stipulates for payment in cash in London, obviously some further terms are required to regulate its performance. Admittedly Hambro's Bank was nominated as the place of payment, a cheque drawn on a foreign bank substituted for cash, and receipt by post accepted at any rate when the letter arrived by or before the twenty-seventh of the month, the twenty-fifth being apparently the accepted day for posting. In these circumstances I think the true inference to be drawn is that the method of performance of the contract was varied by an arrangement for payment to Hambro's Bank by cheque posted at such time as would in the ordinary course of post reach London on the twenty-seventh of the month. " Regularly and properly " are the words used by the arbitrator, and " properly," I think, means in accordance with the accepted practice. No doubt the appellants could at any time have insisted upon a strict performance of the contract after due notice, but they were not, in my view, entitled suddenly to vary the accepted method of performance without first notifying the respondents in time to enable them to perform the contract in strict conformity with the terms of the charterparty. I think, therefore, that payment was duly made in accordance with the practice adopted and accepted between the parties and in the way and at the time stipulated.

At one time some reliance appears to have been placed on behalf of the charterers on the terms of cll. 27 and 34, but that attitude was not persisted in before your Lordships or indeed in the Court of Appeal, and having regard to the grounds of my conclusion the question whether the ship was off hire between September 25 and 30 becomes immaterial. For my own part I would decide this case solely on the ground that the respondents have performed their contract by the method accepted by both parties and would leave all other contentions to be disposed of when their determination is required for the decision of another case.

I would dismiss the appeal and order that the appellants do pay the respondents' costs.

Lord Wright. My Lords, the dispute between the parties is whether the appellants were entitled to cancel the charterparty dated March 18, 1937, between them as owners of the Norwegian tanker *Petrofina* and the respondents as charterers. The charterparty was not a demise and " delivery " was the term used to describe the rights to the service of the vessel enjoyed by the charterers under the contract. The hire was to continue until the hour of her re-delivery to the owners. There was no express provision for the interruption of the hire between the dates of delivery and re-delivery except cl. 27 in which it was provided that in various events payment of hire should cease; but it was clear that that clause was not material in the facts of the case. There were, however, the usual provisions for the event of loss of the vessel and for the case where payment of hire fell due when she was on her way to the port of re-delivery. The exceptions clause, cl. 34, provided that nothing in that clause should limit charterers' right to suspension of hire for any period the vessel may not be at charterers' disposal for a period exceeding forty-eight hours. That provision does not affect this dispute. Clause 11 of the charter is that on which the dispute primarily turns.

The respondents had no intention of failing in their obligation to pay, which, as cl. 11 provided, was to be performed by payment in cash in London. The payment of hire was a vital matter, because if there was default of "such payment" (i.e., in cash monthly in advance in London) the owners were entitled to cancel the long and valuable charter. Default in payment, that is, on the due date is not in my opinion excused by accident or inadvertence. The duty to pay is unqualified so far as the express terms of the charterparty go. I think this is the true construction of the terms of the contract, and it is confirmed by the cases cited in argument. A dictum or decision of Bigham J. in *Nova Scotia Steel Co., Ld.* v. *Sutherland Steam Shipping Co., Ld.* (1), has been relied upon as an authority that a certain latitude was permissible so that payment made two days after the due date did not constitute a default in payment. But I cannot agree that so drastic a departure from the specific words of the charter can be supported. In that case the clause provided for regular and punctual payment: these adjectives however add nothing to the stringency of the simple and unqualified language in the charter before this House. I think that so much of Bigham J.'s judgment as conceded a latitude as to the date of payment is erroneous in law and should be overruled. The importance of this advance payment to be made by the charterers, is that it is the substance of the consideration given to the shipowner for the use and service of the ship and crew which the shipowner agrees to give. He is entitled to have the periodical payment as stipulated in advance of his performance so long

(1) 5 Com. Cas. 106.

as the charterparty continues. Hence the stringency of his right to cancel. But at least that makes it essential to understand precisely what constitutes "payment" All that the clause says is "in cash, monthly, in advance, in London." Cash to whom? What is meant by cash—coin or currency or transfer of credit? The shipowners were in Oslo and the charterers in Brussels. How was transfer to take place? It is not enough to say that the charterer must act at his peril. He is entitled to know what he is to do. Such matters are essential to be specified in order to ascertain if the charterers have made the payment and at what time they made it. To meet these difficulties a method of performance was "accepted "between the parties" as stated in cl. 9 of the special case which ran as follows: "The accepted method between the parties "during the currency of the charter with regard to the pay-"ment of hire had been for the charterers to make the payment "of hire in London at the office of Hambro's Bank, Ld. by "sending a cheque in favour of Hambro's Bank, Ld. (drawn "on the Italo-Belgian Bank, Ld. of London) to be placed by "them to the credit of the owners with the Kristiana Folkebank, "Oslo, and the payment of hire had been regularly and properly "paid in this way during the currency of the charter and had "always been paid on its due date until this payment of the "hire due on September 27." This is a finding of fact which was necessary to fill up the gap in the written charter. Evidence was admissible for this purpose. "Extrinsic evidence is "always admissible, not to contradict or vary the contract, "but to apply it to the facts which the parties had in their "minds and were negotiating about." So the rule was stated by Lord Davey delivering the judgment of the Judicial Committee in *Bank of New Zealand* v. *Simpson* (1). The situation of the parties in this case required some definition of what constituted payment beyond the bare usual and conventional words of cl. 11 of the charterparty. How that definition was effected appears from cl. 9 of the special case. In the *Bank of New Zealand* case (2) the question was whether the words "estimate of the cost of works" included the cost of the land plus the engineer's commission. Lord Davey said (1): "These "words point to something which was known to and in the "contemplation of both parties to the contract, and with "reference to which they contracted: and, in order to construe "and apply the contract you must ascertain what was included

(1) [1900] A. C. 182, 188. (2) Ibid. 182.

"in the 'estimate of 35,000*l.*' on the reduction of which the "contract depended." Here, "payment in cash in London" must involve some definition of what was to be done by the charterers in order to effect payment, the mode and machinery of performance in the contemplation of the parties. The third arbitrator has found what the parties contemplated. He does not say on what evidence he proceeded. It must have been extrinsic and additional to the actual words of the contract, which did not contain the necessary words of specification. He may have found it in the declarations of the parties before the contract was made, as in the authority just cited, or in the machinery actually employed or in some other evidence. This House cannot go behind his finding or inquire on what evidence he acted. It is enough that he found that there had been an accepted method *between* the parties with regard to the payment of hire under the charter. Lord Davey in his judgment (1) proceeded to give other instances in which courts have received evidence in order to give a specific content to general expressions used in the contract; he quoted Lord Campbell C.J.'s words in *Macdonald* v. *Longbottom* (2), saying: "There cannot be the slightest objection to the admission of "evidence of this previous conversation, which neither alters "nor adds to the written contract, but merely enables us to "ascertain what was the subject-matter referred to therein." What was there in question was the meaning of the words "your wool": equally here the relevant subject matter was "payment in cash in London." The necessary definiteness is supplied by cl. 9 of the special case. A similar ruling is to be found in *Kelantan Government* v. *Duff Development Co., Ld.* (3). In that case the finding of an arbitrator that there was to be implied in the deed a contract to construct a railway was upheld. Viscount Cave L.C. (4) referred to some relevant stipulations and considerations which he quoted and said: "These stipulations may not be enough by themselves to lead "to an implication of a contract to construct the line; but "I am not prepared to say that these considerations, coupled "with evidence of facts of which the courts know nothing, "and into which they are not entitled to inquire, cannot "properly have led the arbitrator to his conclusion." He had already pointed out that the implication was not contrary to the deed. It is true that in that case the arbitrator was judge both of fact and law, but that does not affect the general significance for the present case of the words I have quoted.

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(1) [1900] A. C. 182, 188.
(2) (1859) 1 E. & E. 977, 984.
(3) [1923] A. C. 395.
(4) Ibid. 413.

Payment by cheque is, indeed, only conditional payment until the cheque has been cleared and the credit transferred. As I read para. 9 of the special case, the third arbitrator in finding that " the payment had been regularly and properly " paid in this way during the currency of the charter and had " always been paid on its due date until this payment of the hire " due on September 27," is finding that the allowance of a two days' course of post was inter alia the correct procedure under the contract. The trouble was the failure in the course of post. I think para. 9 of the special case is clear. The third arbitrator is finding not only what the accepted method of payment was, but also that " the payment of hire had been " regularly and properly paid in this way." That means, I think, that the sending of the cheque constituted payment for the purpose of cl. 11 of the charter. Then he added that the payment of hire " had always been paid on its due date " until this payment of the hire due on September 27." He has found that payment of hire had been regularly and properly paid in " this way," that is by sending the cheque to Hambro's Bank. He was, I think, taking note that the cheque was only conditional payment, and adding that no difficulty had arisen in London, no doubt because there was no delay in the post and the cheque was duly honoured by means of the ordinary machinery of the clearing house so that eventually the charterers' bank, the Kristiana Folkebank, received the credit. There was no question of the solvency of the respondents or of the goodness of their cheque. The effect of the method was simply to put on the shipowners the inconvenience of any delay in the course of post, which because of the war happened on the critical occasion and resulted in a delay between September 27 and October 3. Some such risk may always be incidental to international business involving the transmission of cash, and in the light of the facts as to the accepted method, I think it results that the risk of that delay fell on the shipowners. In my judgment, it follows that no default in payment of hire can be attributed to the respondents and the appellants were not entitled to claim to cancel the charter. I should therefore answer the third arbitrator's question in the special case for the opinion of the court in that sense.

But there was a further and alternative way of looking at the position which would require the same answer to the question propounded in the special case. The third arbitrator has found in para. 9 of the award what was the accepted way of paying in cash in London. The appellants, it is contended, having accepted that method for the earlier months could not suddenly without reasonable notice insist that the respondents should have adopted a different method of paying the hire, and withdraw the vessel on the ground that the respondents were in default of payment. I think this contention is sound on the principle laid down in *Panoutsos* v. *Raymond Hadley Corporation of New York* (1). The contract there was for the sale of goods by instalments subject to a confirmed credit opened by the buyer: the buyer opened a credit which was not confirmed. Notwithstanding this breach of the contract, the seller made some shipments and received payment by means of the credit. Then without any previous notice he cancelled the contract for the balance on the ground that there was no confirmed credit. It was held by the Court of Appeal that he could not cancel in that way. The contract, it is true, was not changed by the buyer's failure to provide the agreed credit, but the seller could not, having waived strict compliance by the buyer with the contract terms in this respect, put an end to the contract as to the future performance without giving the buyer an opportunity of complying with the condition. Viscount Reading C.J., in giving the judgment of the Court of Appeal said (2): "I cannot find any authority to support the proposition that, "when one party has led another to believe that he may con-"tinue in a certain course of conduct without any risk of the "contract being cancelled, the first-mentioned party can cancel "the contract without giving any notice to the other so as to "enable the latter to comply with the requirement of the "contract." In that case the buyer was admittedly in breach, and the breach was capable of simple and obvious correction in the future deliveries. The present is a fortiori a case for the application of this principle, which is that of fair dealing and justice. Here, even if the opinion I have just stated on the first point is not right, the charterers were adopting the agreed method of making the payments from one place to another. Hence while the shipowners, the appellants, were entitled to insist for the future months of the charter on something which might be regarded as a more correct fulfilment of the terms of cl. 11, they could only do so on giving reasonable notice of their intention and could not cancel until the notice had operated.

(1) [1917] 2 K. B. 473.
(2) Ibid. 479.

On this alternative view also the shipowners would not be entitled to cancel the charter in the events which happened.

These conclusions render it unnecessary to express any opinion on the remaining questions raised in the case. One question I take to be, whether a term should be implied in the settlement of September 25 that sufficient time should be allowed to enable the respondents to make the necessary payment in time to avoid forfeiture. Under different circumstances something might be said in support of such an implication but it is not necessary to consider it in view of the conclusions I have expressed. The other question I may notice is the question whether the appellants had not legally disentitled themselves to enforce the forfeiture by failing in fact though not in intention to restore the vessel to the service of the respondents when the agreement to withdraw the vessel from the charterers' service had terminated in consequence of the settlement so that the vessel was being without justification withheld from their service when the notice of cancellation was given. That question again, is not material to decide in view of my conclusions already stated. I only wish to add that I do not express any opinion on hypothetical cases in which the right of cancellation given by cl. 11 may not be available to the shipowner because of some legal bar affecting him.

I would dismiss the appeal.

LORD UTHWATT. My Lords, cl. 11 of the charterparty so far as material is in the following terms: "Payment of the said "hire to be made as follows:—in cash monthly in advance in "London. In default of such payment, the owners shall have "the faculty of withdrawing the said vessel from the service "of the charterers." It was found by the arbitrator that the hire normally became due on the twenty-seventh day of each month.

Two short questions of construction arise on the clause. First, reliance was placed by the charterers on an opinion expressed by Bigham J. in *Nova Scotia Steel Co., Ld.* v. *Sutherland Steam Shipping Co., Ld.* (1), where it was held that payment made two days after the day appointed for payment "was a regular and punctual payment within the "meaning of the charterparty, and was not made too late." In my view this opinion is wrong, unless there were other provisions in the charterparty there under consideration

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(1) 5 Com. Cas. 106, 109.

H. L. (E.)

1948

TANK-EXPRESS A/S v. COMPAGNIE FINANCIÈRE BELGE DES PETROLES S.A.

Lord Uthwatt

which had the effect of putting a substantial gloss on the meaning of the words "regular and punctual payment." A stipulation for payment on a fixed day or for punctual payment on a fixed day (unless controlled as to meaning by other provisions of the document) means exactly what is said. Payment is not made on the fixed day if it is made later. Parties are at liberty to make such bargains as to dates as appeal to them, and full effect must be given to such bargains however unreasonable it may appear that the exact terms should be insisted on. Courts of equity, indeed, in appropriate cases relieve against failure to pay on a stipulted day, but, in so doing, they do not affect to modify the terms of the bargain, though they alter the result of failure to comply with them.

Second, it was argued that there was no default of payment, unless the charterers, though not having a legal justification or legal excuse, were in some sense blameworthy or at fault in not making the payment. If this construction were accepted, then it was argued that, in the particular circumstances of the case, no blame or fault could be imputed to the charterers. They were victims, not sinners. I do not propose to consider the effect of those circumstances, for in my opinion "in default "of payment" has in this charterparty no meaning other than "on failure so to pay." The phrase "default" on its face relates to the payment, not to the qualities of the payer.

The remaining question is whether in light of the finding of the arbitrator as to the accepted method between the parties with regard to the payment of hire there had in fact been default of payment on September 27. But for the parties coming to some working arrangement, the charterers—a Belgian corporation—with cash in hand, would have had to search for the shipowners—a foreign corporation—in London and, inasmuch as a corporation can act only through agents, pay the cash to some agent of the shipowners in London duly authorized to receive the cash, it being the duty of the shipowners to provide and duly notify to the charterers some person duly authorized to receive payment on their behalf. Some arrangement was obviously necessary in the interests of the shipowners as well as the charterers. The "accepted method" specified by the arbitrator contains the arrangement and it is indeed a sensible arrangement from the point of view of both parties. So long as the arrangement stood, it represented an agreed method of working out the obligation as to payment imposed by the charterparty, as distinct from an agreement to vary its terms. So long as it stood, the shipowners could not demand, nor the charterers insist on making, payment otherwise than in accordance with the terms of the arrangement.

The accepted method as found by the arbitrator is, in my opinion, to be looked at in the same manner as a commercial bargain. The arbitrator is specific in the use of the phrase " by sending a cheque drawn on " the charterers' London bank and it would be toying with unrealities to treat this as meaning anything but sending in the ordinary course of post, a cheque drawn on the named bank, which on presentation was duly met. In an arrangement for the common convenience of the charterers and shipowners I see no reason for not giving the word " sending " its proper meaning. " Sending " means sending and does not involve receipt, just as " specified day " means a specified day and does not include later days. In neither case is there over-indulgence in a passion for accuracy. How then does the matter stand? I fail to see that it is implicit in this particular arrangement that the charterers are to take the risk that the agreed machinery, to which they must adhere, fails in a particular instance to perform the functions that both have assigned to it. There is no reason why that should be implicit. The charterers have done their part. In the ultimate analysis the post is in the matter in hand working for the shipowners. In my opinion therefore the charterers, having complied with the working arrangement as to payment involved in the accepted method, had not breached the contract.

In the result the cheque reached the shipowners' bank on October 3. In my opinion the shipowners were (subject to the cheque being duly honoured) bound to accept that cheque so sent and so received as representing by virtue of the working arrangement the payment due to be made on September 27.

I would dismiss the appeal.

Lord du Parcq. My Lords, one of the questions formulated by the arbitrator for the consideration of the court was in the following words: " Whether on the facts stated, and on the " assumption the hire became due on September 27, notwithstanding the fact that the captain had not received " the owners' instructions to load, the charterers were excused " from paying the hire on September 27 owing to the fact " that the charterers' letter of September 25 was delayed in "the post." (It is common ground that "September 27" must be read for "September 29" where the latter date appears in the special case, and I therefore make the necessary correction.) The wording of this question is perhaps open to some criticism, but when it is read together with, and in the light of, the facts found it may be said, I think, at least to give rough expression to one of the contentions of the respondents at your Lordships' bar. I believe that this contention was sound, and that the right answer to the question is, Yes. If I am right, this appeal can be disposed of on a short and simple ground.

The charterparty, which contains the contract between the parties, is dated March 18, 1937. Hire was to be paid "in "cash, monthly, in advance, in London." The first payment was made on the day when, in the language of the charterparty, the vessel was "delivered," and thereafter the parties are agreed that a payment fell due on the twenty-seventh of each month. When payments are made in advance it is possible that events may show that there has been an over-payment, and the parties had adopted a sensible and not unusual practice by which the charterers were permitted to deduct from the hire payable such sum as represented the amount paid for time off hire during the currency of the previous month. The clause of the charterparty which contains the express words as to the payment of hire which I have already quoted went on to provide that in default of such payment the owners should have the faculty of withdrawing the vessel from the service of the charterers. Having regard to the practice as to payment, I think it is right to treat the twenty-seventh of each month as the due date under the contract, and on that view I have no doubt that if each party had been minded to insist on a literal performance of the contractual obligation, a payment made even a day late would not have sufficed to protect the charterers against cancellation. I cannot agree with the view expressed by Bigham J. in *Nova Scotia Steel Co., Ld.* v. *Sutherland Steam Shipping Co., Ld.* (1), that a payment of hire made two days after the prescribed time "was a regular "and punctual payment within the meaning of the charter-"party and was not made too late." The learned judge's decision in that case may have been right, but, notwithstanding the respect which I have for any opinion of his, I cannot doubt that this dictum was wrong.

(1) 5 Com. Cas. 106, 109.

The terms of the charterparty in the present case were thus clear and precise as to the time, mode and place of payment, except in one particular. Payment was to be made in London —but at what place in London, and to whom ? No answer to these questions is supplied by the charterparty. The owners were a corporation with, so far as appears, no office in London. The charterparty did not name any person authorized to receive payment on their behalf. It was obvious that some arrangement had to be made to enable the contract to be carried out. This was, of course, recognized, and the arbitrator's findings (set out in para. 9 of the special case) show the form which the arrangement took. " The accepted method between the " parties," he says, " during the currency of the charter with " regard to the payment of hire had been for the charterers to " make the payment of hire in London at the office of Hambro's " Bank, Ld. by sending a cheque in favour of Hambro's Bank, " Ld. (drawn on the Italo-Belgian Bank, Ld. of London) " to be placed by them to the credit of the owners with the " Kristiana Folkebank, Oslo." The arbitrator adds that " the " payment of hire had been regularly and properly paid in this " way during the currency of the charter, and had always been " paid on its due date until this payment of the hire due on " September 27," viz., September 27, 1939.

My Lords, it appears to me that these findings leave no room for doubt that the parties had, not indeed varied the contract, but adopted for the time being a substituted mode of performance of the contract which was acceptable to, and accepted by, each of them. If a contract provides for payment in cash, the party to whom payment is due may accept in substitution payment by cheque. Instead of money, a creditor may be willing to accept meal or malt and he may be willing to postpone the date of performance of a contractual duty. No one would doubt this, I think, if a single payment were due under a contract. One who has plainly manifested his willingness to accept a substituted method of performance cannot, when payment is made in the accepted manner, take advantage of some provision in the contract which gives him a remedy in default of payment. It is true that in the present case your Lordships are concerned not with a single payment but with payments which fell due monthly over a long period, but I think it can hardly be disputed that, where periodical payments have to be made, a substituted method of payment which has been " accepted between the parties " from the beginning must be regarded as fully satisfying the requirements of the contract until timely notice is given by one or other of the parties that he withdraws his acceptance of it. That such notice might be given effectively I do not doubt. The distinction between varying a contract and acceding to a variation of the mode of performance of it is well established in our law and, as I have said, there was no variation of the contract in the present case. I conclude, therefore, that if the charterers, when the time came to make the payment due in September, 1939, in fact acted in accordance with the "accepted method," the owners were not entitled, on the ground that, through no fault of the charterers, receipt of the payment was delayed, to exercise a remedy which was open to them only "in default "of" the payment stipulated by the contract.

The question, then, is whether in September, 1939, the charterers did follow the "accepted method." They sent a cheque, and they sent it, as on each previous occasion they had sent their cheque, through the post. It is not suggested that there were not funds in the bank to meet it or that it would not have been met on presentation. They sent it on September 25. Normally it would have arrived by September 27, but, as the arbitrator has found, "owing to the delay in the "post occasioned by the state of war" Hambro's Bank did not receive it until October 3. There is no finding, and nothing in the special case to suggest, that the charterers were negligent in not posting it earlier, or that they had any reason to expect that there would be an unusual delay in transmission. What they did was done (I now quote from para. 5 of the award) "in accordance with the procedure that had been previously "adopted in remitting the hire."

My Lords, to say, in these circumstances, that the owners were entitled to do what they could only do "in default of "payment," that is, to withdraw the vessel from the service of the charterers, is to affirm a proposition which does not accord with good sense, good business or good law. I say this with the utmost respect for the argument of counsel for the owners, who, of course, put their case as forcibly as it could be put. They asked your Lordships not to construe too literally or too precisely the words in which the arbitrator set out the "accepted method." These were, they suggested, mere narrative, not intended to convey the impression that the owners had given up, or suffered to be modified, any of their contractual rights. They protested against a reading of the words which, they said, laid undue stress on the word "sending." Further, relying on the finding of the arbitrator that the payment of hire, until September, 1939, had always been paid on its due date, they argued that it was an essential condition of the "accepted method" that the cheque should arrive in London not later than the twenty-seventh of the month. If it was delivered later, they said, payment could not be said to have been made on that date, and the owners were entitled to their drastic remedy under the charterparty.

I have been anxious not to lay too much stress on any words used by the arbitrator, but I must observe that your Lordships are not now interpreting the loose language of an inartistically drawn contract or the careless words of an inexpert witness, but language used in a special case which may be assumed to have been chosen with precision by the arbitrator, who is, your Lordships were told, an experienced solicitor. He cannot be supposed to have set out facts which he did not consider to be relevant to the questions involved, and indeed the facts which he has found in para. 9 are directly relevant to the question which I began by quoting. The words "the accepted "method between the parties" cannot be explained away as a mere equivalent to some such phrase as "the method which "the charterers had in fact adopted without objection on the "part of the owners." They must surely mean that the owners had not only acquiesced in the method, but approved its continuance at least until they chose to notify the charterers that they withdrew their acceptance. I see no reason to give the word "sending" any but its natural meaning. If the owners were willing that payment should be made by cheque, it was natural and businesslike for them to agree that the charterers, a corporation resident in Brussels, should be permitted to send the cheque from Brussels to London, and, as the parties showed by their conduct and course of dealing, they both recognized that there was no better way of sending it than by post. Whatever form of transmission is adopted, there is a possibility of delay, though it may be a slight possibility. If one party elects to rely on the postal service, or on any messenger of his own choice, he has to bear the responsibility for his agent's delay, but when, as in this case, both parties are agreed that a cheque is to be sent, and it is in fact sent by suitable, and normally expeditious, means, the creditor must run the risk of delay equally with the debtor. It seems to me to be hopeless to contend that the owners' acceptance of the method of payment was subject to a condition, unexpressed but implied, that if the cheque did not arrive in London on September 27, the charterers, though they were not to blame for the delay, should be treated as having made default, and so would incur the risk of losing a contract of great value. If such a condition had been expressly stated, the charterers might well have thought that they were being asked, not to conform to a sensible business arrangement, but to walk into a trap.

It was said with great force by Mr. Le Quesne that the owners would never have agreed that the mere sending of a cheque should be equivalent to payment. Here I agree with him. The owners cannot truly be said to have received payment until they received the proceeds of the cheque. There is always a risk that a cheque may be lost in transit, especially when it has to cross the sea, and since all men, and even banks, are capable of error, it may, through some blunder, not be met, although there are funds to meet it. In either of these events the charterers would no doubt remain liable to pay the hire due, but in neither case would the delay in payment justify cancellation of the contract. The owners have not gone so far as to contend that the receipt of a cheque would not in the circumstances be a sufficient performance of the contract if it arrived too late to be cleared on the twenty-seventh of the month. It follows that they had accepted a system which involved, on their own showing, a possible delay in actual payment. The risk of delay in the post was hardly more serious than the risk of delay in clearing the cheque. That these risks should be accepted by the owners is not surprising. It is much more surprising that they notified the charterers on September 30 of their decision to cancel the contract without making any inquiry of them whether the cheque had been dispatched.

For the reasons I have given I am satisfied that the owners have misunderstood their rights, and I agree with the decision of Atkinson J., though on grounds different from his and from those of Bucknill L.J.

I will only add two observations with regard to the other contentions on which the respondents chiefly relied before the learned judge and in the Court of Appeal. First, I have not been persuaded that a charterer who has agreed to pay a month's hire in advance is absolved from making the payment if, although the owners have not sought to repudiate the contract, the ship is not in fact at the disposal of the charterers for some days immediately before and after the first day of the month of hire. It would surely be more reasonable to argue that if the hire is not paid "in advance," the owners are absolved from giving those services in respect of which hire has to be paid. It must be remembered in this connexion that the course of dealing between the parties was such that any sum overpaid in respect of time off hire in the previous month could be deducted from each monthly payment. Secondly, I doubt whether the dispute which arose between the parties after the outbreak of war, as to the rights and wrongs of which your Lordships are hardly in a position to judge, and the fact that until the parties came to terms on September 25 the owners were refusing to put the ship at the disposal of the charterers, ought to affect your Lordships' decision. I am not myself convinced that any term can be implied in the agreed settlement to the effect that a payment which (ex hypothesi for the sake of this argument) would otherwise have been too late, could properly be made by dispatching a cheque after the negotiation of the settlement. I need not, however, say more about this aspect of the case, because in my view the charterers do not need the protection of any such implied term. They sent a cheque. They sent it in due time. They were not in default, and are entitled to recover damages for the heavy loss which the owners' wrongful repudiation of the contract has inflicted on them.

I am for dismissing the appeal.

LORD MORTON OF HENRYTON. My Lords, I have had the opportunity of reading in print the speech which has just been delivered by my noble and learned friend LORD DU PARCQ. I agree that this appeal should be dismissed, for the reasons which he gives, and I also agree with his comments upon the case of *Nova Scotia Steel Co., Ld.* v. *Sutherland Steam Shipping Co., Ld.* (1). I have not found it necessary to form a concluded opinion on the other contentions of the respondents to which my noble and learned friend refers, but I desire to make some comments on cl. 27 of the charterparty, as its meaning and effect were very fully discussed in the course of the argument, and I understand that a clause in this form frequently appears in charterparties. To my mind this clause is one which would very readily give rise to doubt and litigation. In saying this,

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(1) 5 Com. Cas. 106.

I intend no reflection upon the draftsman of the charterparty now before your Lordships; no doubt he merely adopted a form which is generally in use, but I venture to think it is time that the form was revised. I shall now read cl. 27, inserting the numerals (1.) to (7.) and the letters (*a*) to (*g*) for a purpose which will shortly appear: "(1.) In the event of loss of time "through deficiency of men or stores, repairs, breakdown of "machinery or boilers (whether partial or otherwise), collision "or stranding, or damage preventing the efficient working of "the vessel for more than 48 running hours, or breach of orders "or neglect of duty on the part of the captain causing delay, "(*a*) the payment of hire shall cease from the commencement "of such loss of time until she be again in an efficient state to "resume her service; and (2.) should the vessel from any of the "aforementioned causes put into any other ports than those "to which she is bound under the instructions of the charterers, "(*b*) the port charges, pilotages, and other expenses at those "ports, loss of time consequent upon putting in, shall be borne "by the owners; also (3.) should the vessel put back while on "voyage, by reason of any accident (*c*) the hire shall be "suspended from the time of her putting back until she be "again in the same position and the voyage resumed there- "from; but (4.) should the vessel be driven into port or to "anchorage by stress of weather (*d*) such detention or loss of "time shall be at the charterers' risk and expense. (5.) In the "event of detention of the vessel by authorities at home or "abroad in consequence of legal action against the owners of "the vessel, unless brought about by charterers, whereby the "vessel is rendered unavailable for charterers' service (*e*) the "charter shall be suspended until the service can again be "resumed. (6.) In the event of the nation to which this vessel "belongs becoming engaged in hostilities, (*f*) the hire to cease "during the continuance of such hostilities, if the charterers "find it impossible to employ the vessel in consequence. "It is agreed that all detention or loss of time provided for in "this clause and not paid for shall count as part of the "guaranteed time specified under this charter. All graving "dock charges to be at owners' expense. (7.) Time in and "waiting turn to enter graving dock (*g*) not to count as on hire. "In which event owners are to have the right to employ the "ship on their own account."

It will be observed that the clause deals with seven different sets of circumstances in which "loss of time" may occur, and states in each case the effect which such loss of time is to have upon the financial arrangements between the parties. For the purpose of stating this effect the following phrases are employed: " (*a*) " The payment of hire shall cease " during a specified period. (*b*) " Loss of time . . . . shall be borne " by the owners." (*c*) " The hire shall be suspended " during a specified period. (*d*) " Such detention and loss of time " shall be at the charterers' risk and expense." (*e*) " The " charter shall be suspended " during a specified period. (*f*) " The hire to cease " during a specified period. (*g*) Time in and waiting turn to enter graving dock " not to count as on " hire."

Thus seven different phrases are used, in one and the same clause, and certainly they are not intended to convey seven different meanings. Nor does it appear that all the phrases used have a clear and certain meaning to persons well versed in commercial law. To take one example only, in the present case your Lordships heard a very interesting argument on the question whether the first of these seven phrases meant that during the specified period the charterers were entitled to decline to pay the hire, even if a monthly payment became due under cl. 11, or whether the phrase was directed only to the computation of the amount of the monthly instalments payable by the charterers.

In the course of his argument counsel referred to all the other six phrases which I have quoted, and sought to draw some deduction from them. I do not propose to express any opinion, which would clearly be obiter, as to the meaning of this difficult clause, but I feel sure that it would be possible to express the intention of the parties more clearly and more simply. I believe that each of the various events specified in this form of clause has been inserted by reason of some decided case, but even if it is necessary to retain the list of events, it is surely unnecessary to employ seven different phrases of which some, at least, are not free from ambiguity, to describe what is to be the result of each of these events.

Appeal dismissed.

Solicitors for appellants: *Sinclair, Roche & Temperley.*
Solicitors for respondents: *Ince, Roscoe, Wilson & Griggs.*

Considered. CANADIAN FED. OF AGRICULTURE v. ATT.-GEN. FOR QUEBEC [1951] A. C. 179

J. C.*

1948

Nov. 22.

[PRIVY COUNCIL]

ATTORNEY-GENERAL FOR SASKATCHEWAN . . . . APPELLANT;

AND

ATTORNEY-GENERAL FOR CANADA AND OTHERS . . . . . RESPONDENTS;

AND

ATTORNEY-GENERAL FOR ALBERTA AND ATTORNEY-GENERAL FOR QUEBEC . . . . PRO FORMA RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada — Saskatchewan — Crop failure relief legislation — Limitation of contractual obligations of mortgagors and purchasers of farm land —Constitutional validity—" Interest " legislation—Ultra vires—Farm Security Act, 1944, *c.* 30 *of Statutes of Saskatchewan,* 1944 (*second session*) (*as amended by s.* 2 *of c.* 28 *of Statutes of Saskatchewan* 1945), *s.* 6—*British North America Act,* 1867 (30 & 31 *Vict., c.* 3), *s.* 91 (19.) ; *s.* 92 (13.).

The Farm Security Act, 1944, of Saskatchewan, the main object of which was to lighten the contractual obligations of a mortgagor or purchaser of farm land in the event of there being in any year a " crop failure " as defined in sub-s. 1 of s. 6, provided in sub-s. 2 of s. 6 that : " (2.) Notwithstanding anything to the contrary, " every mortgage and every agreement of sale shall be deemed to " contain a condition that, in case of crop failure in any year " and by reason only of such crop failure :

" 1. the mortgagor or purchaser shall not be required to make " any payment of principal to the mortgagee or vendor during the " period of suspension [as defined in sub-s. 1 of s. 6] ;

" 2. payment of any principal which falls due during the period " of suspension and of any principal which thereafter falls due under " the mortgage or agreement of sale shall become automatically " postponed for one year ;

" 3. the principal outstanding on the fifteenth day of September " in the period of suspension shall on that date become automatically reduced by four per cent. thereof or by the same " percentage thereof as that at which interest will accrue " immediately after the said date on the principal then outstanding, " whichever percentage is the greater ; provided that, notwith-

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* *Present :* VISCOUNT SIMON, LORD MACMILLAN, LORD SIMONDS, LORD OAKSEY and LORD MACDERMOTT.

"standing such reduction, interest shall continue to be chargeable, "payable and recoverable as if the principal had not been so "reduced."

Held, that para. 3 of sub-s. 2 of s. 6 of the Farm Security Act, 1944, was ultra vires the Provincial legislature as being an enactment in relation to "interest," a subject-matter within the exclusive legislative competence of the Dominion Parliament under s. 91, head 19, of the British North America Act, 1867. Further, to provide that principal was to be reduced by statute but that the amount to be paid as interest was to remain unaltered was necessarily to increase the rate on the principal outstanding, and therefore to conflict with s. 2 of the Dominion Interest Act, R. S. C. 1927, c. 102. Secondly, the dealing with interest in para. 3 lay at the heart of the matter and was not merely incidental to the exercise of a valid power to legislate for a modification of principal debts. Lastly, the invalidity of para. 3 involved the consequence that s. 6 was ultra vires as a whole.

Ladore v. *Bennett* [1939] A. C. 468; *Board of Trustees of Lethbridge Irrigation District* v. *Independent Order of Foresters and Attorney-General for Canada* [1940] A. C. 513, and *Attorney-General for Alberta* v. *Attorney-General for Canada* [1947] A. C. 503, referred to.

Judgment of the Supreme Court of Canada [1947] S. C. R. (Can.) 394, affirmed.

APPEAL (No. 99 of 1947), by special leave, from a judgment of the Supreme Court of Canada (May 13, 1947).

The following introductory statement is taken from the judgment of the Judicial Committee. The judgment of the Supreme Court of Canada (Rinfret C.J., Kerwin, Rand and Kellock JJ., Taschereau J. dissenting) answered a question propounded by the Governor-General in Council concerning the constitutional validity of s. 6 of the Farm Security Act, 1944, enacted by the legislature of the Province of Saskatchewan, as amended by s. 2 of c. 28 of the Statutes of Saskatchewan, 1945. There was also a second question, framed on the hypothesis that s. 6 was not ultra vires, and asking whether the section was operative in the case of mortgages securing loans by the Crown in right of Canada and in certain analogous cases. The majority in the Supreme Court held that s. 6 was wholly ultra vires and therefore found it unnecessary to answer the second question. Taschereau J. was of opinion that s. 6 was intra vires, and answered the second question in the negative.

The questions referred by the Governor-General in Council to the Supreme Court for hearing and consideration were formulated as follows:

"1. Is s. 6 of the Farm Security Act, 1944, being c. 30

"of the Statutes of Saskatchewan 1944 (second session) "as amended by s. 2 of c. 28 of the Statutes of Saskatchewan "1945, or any of the provisions thereof, ultra vires of the "Legislative Assembly of Saskatchewan either in whole or "in part and if so in what particular or particulars and to "what extent ?

"2. If the said s. 6 is not ultra vires, is it operative "according to its terms in the case of mortgages

"(*a*) securing loans made by His Majesty in right of "Canada either alone or jointly with any other person "under the National Housing Act, 1944, or otherwise ;

"(*b*) securing loans made by the Canadian Farm Loan "Board ; or

"(*c*) assigned to the Central Mortgage and Housing "Corporation ?"

The Farm Security Act, 1944, of Saskatchewan was entitled "An Act for the protection of certain mortgagors, purchasers "and lessees of farm land," and the main object of the Act was to lighten the contractual obligations of a mortgagor or purchaser of farm land in the event of the yield of grain grown on the land falling below a prescribed minimum. The earlier sections of the Act provided for relief of that nature being granted also to lessees, who rented such land on the terms that the lessor was to receive a share of the crop, but s. 6 was concerned only with the modification of the contractual rights of mortgagees or vendors of farm land in respect of the contractual payments due to them in the event of a "crop failure."

Sub-section 1 of s. 6 defined "crop failure" as meaning a "failure of grain crops grown in any year on mortgaged land "or on land sold under agreement of sale, due to causes beyond "the control of the mortgagor or purchaser, to the extent that "the sum realizable from the said crops is less than a sum equal "to six dollars per acre sown to grain in such year on such "land." The sub-section also contained a definition of the phrase "period of suspension," which meant "the period "commencing on the first day of August in the year in which "the crop failure occurs and ending on the thirty-first day of "July in the next succeeding year." Sub-section 2 of s. 6 ran as follows :

"(2.) Notwithstanding anything to the contrary, every "mortgage and every agreement of sale shall be deemed to "contain a condition that, in case of crop failure in any "year and by reason only of such crop failure :

J. C.
1948
ATTORNEY-GENERAL FOR SASKATCHEWAN v. ATTORNEY-GENERAL FOR CANADA.

"1. the mortgagor or purchaser shall not be required to "make any payment of principal to the mortgagee or "vendor during the period of suspension;

"2. payment of any principal which falls due during the "period of suspension and of any principal which there-"after falls due under the mortgage or agreement of sale "shall become automatically postponed for one year;

"3. the principal outstanding on the fifteenth day of "September in the period of suspension shall on that date "become automatically reduced by four per cent. thereof "or by the same percentage thereof as that at which "interest will accrue immediately after the said date "on the principal then outstanding, whichever per-"centage is the greater; provided that, notwithstanding "such reduction, interest shall continue to be chargeable, "payable and recoverable as if the principal had not been "so reduced."

The opinion of the majority of the Supreme Court of Canada was that s. 6 was ultra vires as a whole, as being legislation in relation to "interest," a subject-matter within the exclusive legislative competence of the Dominion Parliament under head 19 of s. 91 of the British North America Act, 1867.

1948. July 7, 8, 12, 13, 15 and 16. *F. C. Cronkite K.C.*, *R. S. Meldrum K.C.* and *M. C. Shumiatcher K.C.* (all of the Canadian Bar) for the appellant. The pith and substance of the legislation in question is in relation to "agriculture in the "Province" within s. 95 of the British North America Act, 1867, and is also in pith and substance in relation to "property "and civil rights in the Province" within head 13 of s. 92 of the Act of 1867; further, it is enacted in relation to a matter of a merely local or private nature in the Province: s. 92, head 16. In reaching the conclusion that the legislation concerns "interest" the Supreme Court has failed to distinguish between the concepts of "affecting" and "in relation to," that is, a matter which "affects" something is not necessarily "in "relation to" it as that expression is used in ss. 91, 92 and 95 of the British North America Act. The words of s. 95 of that Act are that "in each Province the Legislature may make laws "in relation to agriculture in the Province." The words "in relation to" are also used in s. 92 of the Act. Compared with other activities agriculture occupies a more important position in Saskatchewan than it does in any other province of

J. C.
1948
ATTORNEY-GENERAL FOR SASKATCHEWAN v. ATTORNEY-GENERAL FOR CANADA.

Canada. It is properly described as an agricultural province; there are few secondary industries of any importance: Report of the Royal Commission on Dominion and Provincial Relations vol. 2, p. 100. There are three statutes dealing with this topic which form part of a plan and supplement one another: the Prairie Farm Rehabilitation Act, 1935, of the Dominion, ss. 8, 10; the Land Utilization Act, R.S. Saskatchewan, 1940, c. 192, s. 6; and the Prairie Farm Assistance Act, 1939. With that background, particularly when other similar legislative efforts are considered, it is submitted that Taschereau J. was right when he said: " I have reached the conclusion that " this legislation, being a legislation enacted for the purpose of " dealing with agricultural matters within the Province of " Saskatchewan, is legislation in pith and substance in relation " to agriculture and that it was, therefore, competently enacted " by the Province of Saskatchewan " (1). That there is a definite distinction between the concepts of "affecting" and " in relation to " is a matter of general application in constitutional cases in Canada; legislation may affect things, whether " interest " or " property and civil rights," without being in relation to them. What was said in *Attorney-General for Canada* v. *Attorney-General for Ontario* (2) is exactly applicable to the Prairie Farm Assistance Act, and both that Act and s. 6 of the Farm Security Act now in question have the same object, namely, to stabilize the farming industry. Section 6 of the Farm Security Act, 1944, is completely valid legislation " in relation to " agriculture within the meaning of of s. 95 of the Act of 1867.

Turning next to the submission that s. 6 is in pith and substance in relation to " property and civil rights in the Province " and so within the exclusive legislative competence of the provincial legislature under head 13 of s. 92 of the Act of 1867, *Citizens Insurance Co. of Canada* v. *Parsons* (3) shows that the term " civil rights " is wide enough to embrace rights arising from contract, and also that the Province's legislative jurisdiction over contracts is well established. There can be no doubt with regard to " property " ; if it is property legally and factually, and is within the province, it does not require any argument. Analysing the situation here, there can be no more than two rights involved, (i.) the right of the vendor or mortgagee, and (ii.) the interest in the land. The only things

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(1) [1947] S. C. R. (Can.) 402.
(2) [1937] A. C. 355.
(3) (1881) 7 App. Cas. 96.

J. C.
1948

ATTORNEY-GENERAL FOR SASKATCHEWAN v. ATTORNEY-GENERAL FOR CANADA.

being dealt with in this legislation are either " property " or " civil rights " geographically situated within the province. It has been decided that a mortgage of land is an interest in land : *Yorkney* v. *Thompson* (1). Further, the effect of s. 2 of the Limitation of Civil Rights Act, R.S.S., 1940, c. 88, has been to confine the rights and remedies of mortgagees and vendors of land to the land itself, situate within the province. There is only one other feature to be mentioned in this connexion, namely, that the right here assumes the form of a specialty, and there are decisions to the effect that the right may follow the situs : *Toronto General Trusts Corporation* v. *The King* (2). *Workmen's Compensation Board* v. *Canadian Pacific Ry. Co.* (3) shows that the traditional interpretation of " property and civil rights " has not been a narrow one. A broad interpretation has been given to that phrase in such cases as *In re The Board of Commerce Act*, 1919, *and The Combines and Fair Prices Act*, 1919 (4) and *Citizens Insurance Co. of Canada* v. *Parsons* (5), which was followed in a series of cases. In every Province of Canada there are many statutes which essentially do the same thing as is attempted to be done by s. 6 of the Farm Security Act and which have never been questioned : the various Exemption Acts are similar in their operation and effect to s. 6 now in question, in that they directly affect the rights of parties to agreements by extraneously modifying the terms thereof. Of the same effect are the Limitation of Actions Acts, which are a part of the statute law of every jurisdiction based on Anglo-Saxon law. Neither the Exemption Acts nor the Limitation of Actions Acts can be supported as intra vires unless s. 6 here also is.

No matter what s. 6 may be as a whole, it certainly is not " interest " legislation. It is not the form of the statute, but its effect and operation, which are important to a determination of its constitutional validity. When the whole of s. 6 is considered it will be seen that the only occasion on which the cancellation of principal has any real bearing is when the debtor desires to pay sufficient to discharge a mortgage or obtain a transfer under an agreement for sale, or, at any particular time, to determine the sum due and owing by the debtor to his secured creditor. This follows from the provision that interest is to continue to be chargeable as if the principal

(1) (1914) 50 S. C. R. (Can.) 1.
(2) [1919] A. C. 679, 685.
(3) [1920] A. C. 184, 191–2.
(4) [1922] 1 A. C. 191.
(5) (1881) 7 App. Cas. 96.

J. C.
1948

Attorney-General for Saskatchewan v. Attorney-General for Canada.

had not been reduced. The amount required to pay a mortgage or indebtedness under an agrement for sale is the full amount of the interest owing to the date of payment, having no regard to the provisions of para. 3 of sub-s. 2 of s. 6, together with the full amount of the principal, less the deduction provided for in that paragraph. The amount of the deduction is determined by the following formula: a deduction is made from the principal with respect to each crop failure year occurring in the year 1944 and in every subsequent year, consisting of a percentage of the principal outstanding on September 15 of each crop failure year (after taking into account previous deductions), which is either 4 per cent. or the same percentage as the rate of interest stipulated in the mortgage or agreement, whichever is greater. Thus, it is clear that interest is not dealt with in any way, since the reductions are made exclusively from principal after all the interest contemplated by the parties to the agreement has accrued and fallen due. Even in cases in which no interest is payable under the terms of a mortgage or agreement for sale, or where payments are made on a share-crop basis or by bushelage, the provisions of the section apply, and reductions in principal are accordingly made. It is difficult to contemplate a statute which more specifically excludes the subject of interest from its scope and application.

Section 2 of the Dominion Interest Act, R. S. C. 1927, c. 102, is a permissive section, and there is here no violation of it. *Attorney-General for Ontario* v. *Reciprocal Insurers* (1) explains what is meant by " pith and substance " ; and what is really meant is, what in substance was the legislature trying to do ? What object was it trying to effect ? Looking at s. 6 as a whole, it cannot be said that " interest " in pith and substance was being dealt with ; the legislature was quite obviously trying to bring about stability in agriculture. There is, therefore, nothing dealing with interest, but even if there is, it is submitted that it is doing so merely incidentally : *Ladore* v. *Bennett* (2). Lastly, if any parts of s. 6 are beyond the powers of the Province, such parts are merely inoperative and the section is not ultra vires : on the question of severability see *Toronto Corporation* v. *York Corporation* (3) and *Attorney-General for Alberta* v. *Attorney-General for Canada* (4).

J. L. Ilsley K.C. (of the Canadian Bar), *Gahan*, and *D. W.*

(1) [1924] A. C. 328.
(2) [1939] A. C. 468.
(3) [1938] A. C. 415.
(4) [1947] A. C. 503, 518.

J. C.

1948

ATTORNEY-GENERAL FOR SASKATCHEWAN
v.
ATTORNEY-GENERAL FOR CANADA.

Mundell (of the Canadian Bar) for the respondent the Attorney-General for Canada. Section 6 is legislation in relation to "interest," a matter within the exclusive legislative authority of the Parliament of Canada under head 19 of s. 91 of the British North America Act. Although the draftsman was attempting to reduce principal, he was really trenching on "interest" in the form of reduction of principal. The purported reduction of principal under para. 3 of sub-s. 2 of s. 6 is merely a colourable device designed to carry out the true object of cancelling, reducing and changing the interest obligation and thus of legislating in relation to interest. In pith and substance this is interest legislation, for if one reduces the capital but maintains the interest quantum then the rate of interest is being affected While in form the section effects a reduction of principal its true purpose and effect is to relieve the mortgagor of a financial obligation equal to the amount of interest he is obliged to pay, or, put colloquially, to cancel the interest. [On the question of pith and substance and colourability reference was made to *Board of Trustees of Lethbridge Irrigation District* v. *Independent Order of Foresters and Attorney-General for Canada* (1); *Ladore* v. *Bennett* (2); *Union Colliery Co. of British Columbia* v. *Bryden* (3); *Attorney-General for Ontario* v. *Reciprocal Insurers* (4); *Attorney-General for Alberta* v. *Attorney-General for Canada* (5) and *Attorney-General for Canada* v. *Attorney-General for the Province of Quebec and Others* (6).] Selection of interest as the yardstick, reduction of the amount payable by the amount of the interest, is not explainable on any other basis than that the burden of which the legislature was trying to relieve the farmer was that of interest. The proviso in para. 3 establishes that no real reduction in principal was intended, for if reduction in principal was all that was intended, interest would thereafter be payable in respect of the reduced principal and there would have been no proviso. The effect produced is that the aggregate debt is not increased during the period of crop failure by the amount of the interest, but otherwise the debt is not affected. It seems reasonably clear that the true object and purpose of the section is to nullify, under the conditions stated in the section, the obligation to pay interest owing under contracts, and such legislation is beyond the authority of the provincial legislature.

(1) [1940] A. C. 513, 532–3.
(2) [1939] A. C. 468.
(3) [1899] A. C. 580.
(4) [1924] A.C. 328.
(5) [1939] A. C. 117.
(6) [1947] A. C. 33, 44.

J. C.

1948

ATTORNEY-GENERAL FOR SASKATCHEWAN *v.* ATTORNEY-GENERAL FOR CANADA.

As Kerwin J. said, interest is the warp and woof of the enactment.

Next, this is not legislation in relation to agriculture in the province so as to come within the authority of s. 95 of the British North America Act. This is not legislation in relation to agriculture at all, quite apart from whether interest is merely incidental to it. Any legislation which promotes the welfare of farmers makes it more likely that they will stay on the land and stabilize agriculture as an industry : that may be legislation affecting farmers, but it is not legislation affecting agriculture in the sense that the term is used in the British North America Act. It was contended for the appellant that the change in the interest rate which results from this legislation is merely incidental to a scheme which is good as property and civil rights legislation. It is submitted that the right of the Province to legislate on the obligation to pay interest as a civil right is withdrawn from s. 92 of the Act of 1867 because the Province cannot legislate in any way as to a civil right when that civil right falls within s. 91. [Reference was made to the *Lethbridge* case (1), *Ladore* v. *Bennett* (2) ; *Day* v. *City of Victoria* (3) ; *John Deere Plow Co., Ld.* v. *Wharton* (4) ; *Great West Saddlery Co.* v. *The King* (5) and *Burrard Power Co., Ld.* v. *The King* (6), which last case established that provincial legislation otherwise valid as legislation in relation to a matter within the authority of the Province did not apply and was ultra vires as to certain matters falling within the heads of s. 91.] Moreover, the legislation here conflicts with the provisions of the Interest Act, R. S. C. 1927, c. 102, which is legislation validly enacted by the Dominion Parliament : that was not the case in *Ladore* v. *Bennett* (2) and in *Day* v. *City of Victoria* (3). Apart from conflict altogether, when the legislature alters an agreed rate, that alteration cannot be said to be incidental, having in mind that the Dominion has legislated in respect of the rate which is payable when there is an agreement. The alteration of the agreed rate is neither incidental to the rest of the scheme nor severable. The interest provision is in relation to a civil right carved out of s. 92 and put into s. 91, and the Province cannot legislate on that civil right. The attempt here is to invade an exclusive Dominion field. The proviso is inseverable : it is inextricably tied up with the

(1) [1940] A. C. 513, 532-3.
(2) [1939] A. C. 468.
(3) (1938) 3 W. W. R. 161.
(4) [1915] A. C. 330, 340.
(5) [1921] 2 A. C. 91.
(6) [1911] A. C. 87.

rest of the section, and the scheme is entirely altered if the proviso is taken out: *Attorney-General for Alberta* v. *Attorney-General for Canada* (1). If any of the provisions of s. 6 might validly be enacted by the provincial legislature they are not severable from those that are beyond the authority of the legislature, and the whole section is therefore ultra vires. Next, s. 6 is legislation in relation to "bankruptcy and "insolvency," a matter within the exclusive legislative authority of the Dominion Parliament under head 21 of s. 91; the section also invades the field already occupied by legislation validly enacted by that Parliament, namely, the Bankruptcy Act, the Farmers Creditors Arrangement Act, 1943, and other legislation. Further, s. 6 is ultra vires in so far as it applies to companies incorporated by the Dominion Government under Dominion legislation for the purpose of lending money, because it frustrates and renders impossible the carrying on of the objects for which they are incorporated. Lastly, s. 6 purports to confer the judicial powers of superior or district courts on the Provincial Mediation Board, which is a body not competent to exercise such powers under ss. 96, 99 and 100 of the British North America Act. The application to the board is in the nature of an action for a declaration of the rights of the parties under a statutory agreement which the legislature has written into a mortgage or agreement of sale. The board is under a duty to entertain the application; there must be a hearing, and witnesses may be required or compelled to attend. [On this question of whether the powers of the board were judicial reference was made to *O. Martineau & Sons, Ld.* v. *Montreal City* (2); *Shell Co. of Australia* v. *Federal Commissioner of Taxation* (3) and *Toronto Corporation* v. *York Corporation* (4).]

C. F. H. Carson K.C. and *L. G. Goodenough* (both of the Canadian Bar) for the respondent the Dominion Mortgage and Investments Association. The Dominion Mortgage and Investments Association is an unincorporated association representing twelve loan companies, sixteen trust companies and twenty-five insurance companies. Thirty-four of these companies, including eighteen Dominion incorporated companies, carry on a mortgage business in the Province of Saskatchewan, and had investments in mortgages and agreements for sale secured by farm lands in the Province amounting to about $46,000,000 at the end of 1945. Section 6 discloses

(1) [1947] A. C. 503, 518.
(2) [1932] A. C. 113, 120.
(3) [1931] A. C. 275, 295–7.
(4) [1938] A. C. 415.

a strange legislative scheme, which has no precedent in any other Province of Canada, and would seem to call particularly for the application of the principles stated by Duff C.J. in *Attorney-General for Ontario* v. *Reciprocal Insurers* (1) to the effect that one must go behind the form to the substance of the legislation. It is apparent on its face that s. 6 affects in a material way the vital provisions of mortgages and agreements for sale of farm lands. The section purports to write a new contract, a fictional contract, by which the lender is compelled to accept in lieu of his investment what, it is submitted, is a speculation. It is a speculation, first, as to what proportion of the principal amount will be repaid; secondly, it is a speculation as to the amount of payment on account of principal that will be postponed; thirdly, it is a speculation as to the date when the principal as reduced will mature, and lastly, it is a speculation as to the amount of interest that the mortgagee will lose. So far as existing mortages are concerned, the effect of s. 6, sub-s. 2, is to destroy the vital terms agreed to by the parties and to substitute terms imposed compulsorily by the legislature. So far as the future is concerned, no lending institution would lend money on a mortgage which had imported into it the conditions prescribed by sub-s. 2. The eflect of the legislation, so far as the Dominion lending institutions are concerned, is to prohibit them from carrying on in Saskatchewan that business which, by valid Dominion legislation, they have been empowered to carry on in all parts of Canada. The true purpose of s. 6 is to relieve a mortgagor of a financial burden arising out of his mortgage debt to an amount equal to, or substantially equal to, the amount of interest that is payable under the mortgage. The object or purpose of the legislation was to scale down substantially the interest on existing farm debts in Saskatchewan, just as in the *Lethbridge* case (2) the object was to scale down substantially the interest on the existing provincial debt in Alberta. It is abundantly clear that the legislation is directed to interest in so many aspects and its operation governs so plainly contractual interest that it must be regarded as legislation in pith and substance in relation to interest and therefore ultra vires. If interest is pulled out of the section the whole structure collapses. If it be right that the section is in pith and substance in relation to interest then it cannot be in pith and substance in relation to agriculture.

(1) [1924] A. C. 328.   (2) [1940] A. C. 513.

J. C.

1948

ATTORNEY-GENERAL FOR SASKATCHEWAN *v.* ATTORNEY-GENERAL FOR CANADA.

Paragraph 3 of sub-s. 2 of s. 6 is not severable. The legislature has in terms described para. 3 as a condition, and it is submitted, on the assumption that para. 3 is invalid as being in relation to interest, that the deletion of that paragraph or condition written into the contracts would convert a condition in the contract of one character into a condition of a vastly different character. Looking at s. 6 as a whole, it discloses one unitary scheme, and its structure breaks down if there is withdrawn from it what must be regarded as the all-important feature of that single scheme. There was no suggestion in the factum of the Attorney-General for Saskatchewan that anything less than the whole of s. 6 would have been acceptable. [On the question of severability reference was made to *Attorney-General for British Columbia* v. *Attorney-General for Canada* (1) and *Attorney-General for Alberta* v. *Attorney-General for Canada* (2).] Secondly, while supporting the argument for the Attorney-General for Canada on the question of judicial powers, if it were to be held that sub-ss. 3 and 4 are invalid and must be struck out, then it is submitted that the whole section would be ultra vires. The concluding submission on the whole matter is that para. 3 is in pith and substance interest and cannot be dismembered from that single condition which the legislature has attempted to write into the contract, and on that ground alone the appeal should be dismissed.

Cronkite K.C. replied, and in support of the contention that this was not interest legislation referred to the *Lethbridge* case (3), *City of Montreal* v. *Attorney-General for Canada* (4) and *City of Halifax* v. *Fairbanks' Estate* (5). With regard to severance, two matters are involved, first, intent, and secondly, whether severance would do violence to the scheme: *Tremblay* v. *Kowhanko* (6); *Attorney-General for Quebec* v. *Slanec & Grimstead* (7). There are two submissions on sub-ss. 3 and 4 of s. 6, first, that the Mediation Board was performing only an administrative function, and secondly, that even if the duties were not administrative, they were not of such a nature as those performed in 1867 by the courts enumerated in s. 96 of the British North America Act: no case has been produced showing that the courts designated by s. 96 did in 1867 perform any such duties as have been assigned to the Mediation Board by sub-ss. 3 and 4: *Polson Iron Works* v. *Munns* (8).

(1) [1937] A. C. 377, 387.
(2) [1947] A. C. 503, 518.
(3) [1940] A. C. 513.
(4) [1923] A. C. 136.
(5) [1928] A. C. 117.
(6) (1920) 51 D. L. R. 174, 199.
(7) (1933) 2 D. L. R. 289.
(8) (1915) 24 D. L. R. (S. C.) 19.

J. C.
1948

ATTORNEY-GENERAL FOR SASKATCHEWAN *v.* ATTORNEY-GENERAL FOR CANADA.

Nov. 22. The judgment of their Lordships was delivered by VISCOUNT SIMON, who after the introductory statement set out above, continued: In the view which their Lordships take on the constitutional validity of sub-s. 2, and on its relation to the rest of s. 6, it is not necessary to set out the remaining sub-ss. of s. 6, though they have been carefully examined to see if they throw further light on sub-s. 2. The contention of the respondents is that para. 3 of sub-s. 2 is ultra vires of the provincial legislature of Saskatchewan because it is an enactment in relation to "interest"—a matter which, by s. 91, head 19, of the British North America Act is within the exclusive legislative power of the Dominion Parliament. It is further contended by the respondents that the impeached provision conflicts with provisions of the Interest Act of Canada. Reliance was also placed on head 21 of s. 91, which confers on the Dominion Parliament the exclusive power to legislate in relation to "Bankruptcy or Insolvency." On this last point their Lordships would be disposed to agree with Taschereau J. (who alone deals with it) that the respondents' contention is unsound, but the real difficulty in the appellant's way lies elsewhere.

The appellant argues that the "pith and substance" of para. 3 is "property and civil rights," a matter in relation to which the provincial legislature has an exclusive legislative power, and that in so far as para. 3 affects "interest" it does so only incidentally. In support of this view the Attorney-General for Saskatchewan relies on *Ladore* v. *Bennett* (1), and especially on the concluding passage of Lord Atkin's judgment (2). A further ground on which the appellant contends that the impeached paragraph is intra vires of the Province is that its "pith and substance" is "agriculture in "the Province" within the meaning of s. 95 of the British North America Act, and that it is not repugnant to any Act of the Parliament of Canada such as is referred to in that section.

It is convenient to deal first with this last contention, which provided a chief ground on which the dissenting judgment of Taschereau J. was based. There was abundant evidence that agriculture is the main industry of Saskatchewan and that it is the principal source of revenue of its inhabitants. It is moreover clear that the result of the impeached legislation, if it is validly enacted, would be to relieve in some degree a certain

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(1) [1939] A. C. 468.

(2) Ibid. 483.

J. C.

1948

ATTORNEY-GENERAL FOR SASKATCHEWAN *v.* ATTORNEY GENERAL FOR CANADA.

class of farmers from financial difficulties due to the uncertainties of their farming operations. But, as Rand J. points out, there is a distinction between legislation "in "relation to" agriculture and legislation which may produce a favourable effect on the strength and stability of that industry. Consequential effects are not the same thing as legislative subject-matter. It is "the true nature and "character of the legislation"—not its ultimate economic results—that matters (*Russell* v. *The Queen* (1)). Here, what is sought to be statutorily modified is a contract between two parties one of which is an agriculturist but the other of which is a lender of money. However broadly the phrase "agriculture in the Province" may be construed, and whatever advantages to farmers the re-shaping of their mortgages or agreements for sale might confer, their Lordships are unable to take the view that this legislation can be regarded as valid on the ground that it is enacted in relation to agriculture.

A more difficult question is raised by the alternative contention that the legislation is in relation to civil rights in the Province. Contractual rights are, generally speaking, one kind of civil rights and, were it not that the Dominion has an exclusive power to legislate in relation to "interest," the argument that the provincial legislature has the power, and the exclusive power, to vary provisions for the payment of interest contained in contracts in the province could not be overthrown. But proper allowance must be made for the allocation of the subject-matter of "interest" to the Dominion legislature under head 19 of s. 91 of the British North America Act. There is another qualification to the otherwise unrestricted power of the provincial legislature to deal with civil rights in head 18, "Bills of Exchange and Promissory "Notes." The Dominion power to legislate in relation to interest cannot be understood to be limited to a power to pass statutes dealing with usury such as were repealed in the United Kingdom in 1854 (17 & 18 Vict., c. 90). So restricted a construction was rejected by the Judicial Committee in *Board of Trustees of Lethbridge Irrigation District* v. *Independent Order of Foresters and Attorney-General for Canada* (2) for reasons stated by Viscount Caldecote. The validity of the Interest Act of the Parliament of Canada (R. S. C. 1927, c. 102) has not been challenged in any particular. Section 2 of this statute provides: "Except as otherwise

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(1) (1882) 7 App. Cas. 829, 840. (2) [1940] A. C. 513, 530–1.

J. C.
1948

ATTORNEY-GENERAL FOR SASKATCHEWAN v. ATTORNEY-GENERAL FOR CANADA.

"provided by this or by any other Act of the Parliament of "Canada, any person may stipulate for, allow and exact, on "any contract or agreement whatsoever, any rate of interest "or discount which is agreed upon." It is therefore clear that a provincial statute which varies the stipulation in a contract as to the rate of interest to be exacted would not be consonant with the existence and exercise of the exclusive Dominion power to legislate in respect of interest. The Dominion power would likewise be invaded if the provincal enactment was directed to postponing the contractual date for the payment of interest without altering the rate, for this would equally be legislating in respect of interest.

There thus remain two questions to be considered: first, does the provincial statute now under consideration operate to the above effect? And secondly, even if it does, can the consequent invalidity be avoided because this result should be regarded as merely incidental to the achievement of the real and valid statutory purpose, so that, although the topic of interest is trenched upon, the subject of interest is not the pith and substance of the Act? The first of these questions must be answered in the light of an established rule of construction in such cases, namely, that regard must be had to the substance and not to the mere form of the enactment, so that "you cannot do that indirectly which you are prohibited from "doing directly" (per Lord Halsbury in *Madden* v. *Nelson and Fort Sheppard Ry. Co.* (1)). If, under colour of an arrangement which purports to deal only with the principal of a debt, it is really the contractual obligation to pay interest on the principal which is modified, the enactment should be regarded as dealing with interest. With this rule in mind, their Lordships have examined the language and effect of s. 6 of the Farm Security Act with much care, and they have been greatly assisted in this task by the arguments of counsel on either side. Sub-section 2 of s. 6 provides in effect that, in the event of crop failure, (*a*) the mortgagor or purchaser shall not be required to make any payment of principal during the period of suspension, (*b*) the payment of any principal which is contractually due during that period and any principal which thereafter falls due shall be postponed for one year, (*c*) the principal outstanding on September 15 in the period of suspension shall on that date become automatically reduced by 4 per cent. thereof "or by "the same percentage thereof as that at which interest will

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(1) [1899] A. C. 626, 627.

" accrue immediately after the said date on the principal then " outstanding, whichever percentage is the greater," but (*d*) notwithstanding such reduction, interest shall continue to be chargeable, payable and recoverable as if the principal had not been so reduced.

It is not in dispute that mortgages or agreements to defer payment of purchase money of land in Saskatchewan, practically without exception, provide for interest on outstanding principal at a rate greater than 4 per cent. per annum. The effect, therefore, is to reduce the outstanding principal, in the event of crop failure, by an amount equal to the amount of interest called for under the contract, but to require this same amount of interest to continue to be paid as though the outstanding principal had not been reduced. If the sub-section had said in plain terms that for the period of suspension there should be no interest charged and that the payment of outstanding principal should be postponed, the result (at any rate in the first year of suspension) to the mortgagee or vendor would be the same. Moreover, such agreements normally stipulate for a " rate " of interest on outstanding principal, and a " rate " is the ratio which the sum payable as interest bears to the amount of such outstanding principal. To provide that principal is to be reduced by statute but that the amount to be paid as interest is to remain unaltered is necessarily to increase the rate on the principal outstanding. But provincial legislation which alters a stipulated rate of interest would conflict with s. 2 of the Interest Act. These considerations lead their Lordships to confirm the conclusion at which the majority of the Supreme Court has arrived, that para. 3 of sub-s. 2 of s. 6 trenches upon the Dominion field. It is obvious that the language used has been ingeniously chosen in an endeavour to avoid a conflict with Dominion powers and legislation, but in the view of their Lordships the endeavour is not successful. This view of the matter renders it unnecessary to determine what would be the correct application of the words used in the difficult situation of successive years of suspension analysed in the judgment of Kellock J.

Secondly, can the remaining argument be upheld that this interference with the topic of interest none the less remains valid because it is merely incidental to the exercise of a valid power to legislate for a modification of principal debts? On this, it is to be observed that there is not only an exclusive power to legislate in relation to interest vested in the Dominion

J. C.

1948

ATTORNEY-GENERAL FOR SASKATCHEWAN *v.* ATTORNEY-GENERAL FOR CANADA.

Parliament, but that such legislation has been enacted in the Interest Act. Viscount Maugham laid it down on behalf of this Board in *Attorney-General for Alberta* v. *Attorney-General for Canada* (1), that " Since 1894 it has been a settled proposition " that, if a subject of legislation by the Province is only " incidental or ancillary to one of the classes of subjects " enumerated in s. 91, and is properly within one of the subjects " enumerated in s. 92, then legislation by the Province is " competent unless and until the Dominion Parliament chooses " to occupy the field by legislation." Viscount Maugham's reference to the year 1894 points to the decision of this Board in *Attorney-General for Ontario* v. *Attorney-General for Canada* (2). Apart, however, from the obstacle created by the existence of the Dominion Interest Act, their Lordships are unable to take the view that the dealing with interest is only incidental, for it lies at the heart of the matter. Their Lordships are not called on to discuss, and do not pronounce on, a case where a provincial enactment renders null and void the whole contract to repay money with interest. Here the contracts survive, and once the conclusion is reached that, as Kerwin J. said, " the legislation here in question is definitely in relation to " interest," reliance on such a decision as *Ladore* v. *Bennett* (3) is misplaced. The provincial legislation there considered was legislation in relation to " municipal institutions in the " Province," and, as Viscount Caldecote pointed out in the *Lethbridge* case (4) : " having come to the conclusion that the " pith and substance of the legislation in question related to " one or more of the classes of subjects under s. 92, the Board " had no difficulty in holding that the regulation of the interest " payable on the debentures of the new City was not an invasion " of Dominion powers under head 19 of s. 91."

Lastly, does the invalidity of para. 3 involve the consequence that s. 6 is ultra vires as a whole ? Their Lordships agree with the Supreme Court that it does, and this view renders it unnecessary to answer the final question posed by the Governor-General in Council. The Board has recently had occasion, in *Attorney-General for Alberta* v. *Attorney-General for Canada* (5) to set out some of the considerations which have to be weighed in deciding whether legislation, a portion of which is found to be ultra vires, is invalid only as to that portion.

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(1) [1943] A. C. 356, 370.

(2) [1894] A. C. 189.

(3) [1939] A. C. 468.

(4) [1940] A. C. 513, 532.

(5) [1947] A. C. 503.

Applying these tests, it is clear that paras. 1 and 2 of sub-s. 2 of s. 6 are bound up with para. 3 and that sub-s. 2 expresses a single scheme. Sub-section 2 in its turn is the main effective provision of s. 6 and thus s. 6 is ultra vires as a whole.

J. C.
1948
ATTORNEY-GENERAL FOR SASKATCHEWAN *v.* ATTORNEY-GENERAL FOR CANADA.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed.

Solicitors for appellant : *Blake & Redden.*

Solicitors for Attorney-General for Canada : *Charles Russell & Co.*

Solicitors for Dominion Mortgage and Investments Association : *Lawrence Jones & Co.*

[PRIVY COUNCIL]

CHENARD AND COMPANY AND OTHERS . APPELLANTS ;

AND

JOACHIM ARISSOL . . . . . RESPONDENT.

J. C.*
1948
Nov. 30.

ON APPEAL FROM THE SUPREME COURT OF SEYCHELLES.

Seychelles—Legislative council—Alleged defamatory statement by member in council chamber—Immunity from action—Absolute privilege—Seychelles Penal Code (Ord. No. 10 *of* 1904), *s.* 192, *sub-s.* 1 (*a*) *—Letters Patent of August* 31, 1903, *cl.* 8*—Colonial Laws Validity Act,* 1865 (28 *&* 29 *Vict., c.* 63), *ss.* 2, 5.

Section 192, sub-s. 1, of the Seychelles Penal Code, 1904, which provided that " no prosecution or action for defamation shall be " competent against—(*a*) the President or a member of the " Legislative Council for anything said or written by him in such " capacity from his place in such Council," was within the power to legislate conferred on the legislature of the Colony by the Letters Patent of 1903, by virtue of which the Seychelles Islands were erected into a separate Colony, was not repugnant to any Act of the Imperial Parliament and was therefore intra vires and valid. While a power to make ordinances " for the peace, order " and good government of the Colony "—as was conferred by cl. 8 of the Letters Patent of 1903—does not authorize alteration of the constitution or powers of the colonial legislature, it does authorize the enactment of rights, privileges and immunities, whether these

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* *Present :* LORD SIMONDS, LORD UTHWATT, LORD MORTON OF HENRYTON and LORD REID.

J. C.

1948

CHENARD AND CO. *v.* JOACHIM ARISSOL.

be general or in favour of particular persons or classes of persons.

Riel v. *The Queen* (1885) 10 App. Cas. 675, referred to.

Section 192, sub-s. 1 (*a*), of the Seychelles Penal Code is not a law respecting the constitution, powers and procedure of the legislature of Seychelles within the meaning of s. 5 of the Colonial Laws Validity Act, 1865.

On the question whether absolute privilege must be held to have been impliedly granted whenever a colonial legislature was established by competent authority, the Board saw no reason to differ from the opinion of Martin C.J. in *Gipps* v. *McElhone* (1881) 2 N. S. W. 18, at p. 21, where he said that " there is no " doubt in my mind of the existence of this privilege, and that " it is absolute. It arises from inherent necessity. The necessity " is just as great here as in the Imperial Parliament," or to draw any distinction in that matter between representative and non-representative legislative assemblies.

Barton v. *Taylor* (1886) 11 App. Cas. 197, at 203, and *Kielley* v. *Carson* (1842) 4 Moo. P. C. 63, referred to.

Judgment of the Supreme Court of Seychelles affirmed.

APPEAL (No. 39 of 1947) from a judgment of the Supreme Court of Seychelles (March 20, 1947) which held, on a preliminary point of law, that s. 192, sub-s. 1 (*a*), of the Seychelles Penal Code, 1904, conferred on a member of the legislative council of Seychelles immunity from prosecution or action for defamation for anything said or written by him in such capacity in the council.

The following facts are taken from the judgment of the Judicial Committee. The defendant and respondent in this case was a member of the legislative council of Seychelles. The plaintiffs and appellants were merchants in Seychelles, and the present action was brought by them in consequence of statements admittedly made by the respondent in the course of a speech in the legislative council on December 28, 1946. Those statements were alleged to be defamatory of the appellants, and it was further alleged that the respondent abused his position as a member of the legislative council for the purpose of making false, malicious and defamatory statements against the appellants. The respondent, while denying those allegations, pleaded in limine litis that no action lay in law against him as a member of the legislative council on the averments of the statement of claim. That plea was sustained by the Supreme Court of Seychelles (Touris A.C.J.) on March 20, 1947.

By s. 192, sub-s. 1, of the Seychelles Penal Code, 1904:
" No prosecution or action for defamation shall be competent " against—(*a*) the President or a member of the Legislative

" Council for anything said or written by him in such capacity " from his place in such Council . . . ."

1948. Oct. 15, 18. *Pritt K.C.* and *Colombos* for the appellants. The Seychelles legislative council is admittedly not a representative legislature as defined by s. 1 of the Colonial Laws Validity Act, 1865, and s. 5 of that Act impliedly says that a non-representative legislature cannot pass legislation respecting the " constitution, powers and procedure " of the legislative council. Section 192, sub-s. 1 (*a*), of the Seychelles Penal Code, which purports to confer immunity from prosecution or action for defamation on members of the legislative council, is legislation respecting the " constitution, powers and " procedure " of the legislature within the meaning of s. 5 of the Act of 1865, and is therefore repugnant to that section and accordingly, by virtue of s. 2 of the Act of 1865, is ultra vires and inoperative in so far as it concerns the privileges and immunities of the President and members of the legislative council. The nearest authority which throws any light on the matter, but may not carry us very far, is *Fielding* v. *Thomas* (1), in which it was said : " it surely cannot be contended that the " independence of the provincial legislatures from outside " interference, its protection, and the protection of its members " from insult while in the discharge of their duties, are not " matters which may be classed as part of the constitution of " the province, or that legislation on such matters would not be " aptly and properly described as part of the constitutional " law of the province." As illustrations of the manner in which these matters are dealt with reference may be made to the Western Australian Constitution Act, 1890 (54 Vict., c. 26), s. 36, and to s. 49 of the Commonwealth Constitution Act, 1900 (63 & 64 Vict., c. 12). It all comes back to whether it is part of the constitutional power of the legislature to protect the freedom of speech of its members : see also Anson's Law and Custom of the Constitution (1922), 5th ed., vol. 1, pp. 153, 162, 172–5, s. 4.

Melford Stevenson K.C., *Harold Paton* and *Medd* for the respondent. Section 192 of the Penal Code is not legislation respecting the " constitution," and it does not assist to examine text-books and authorities in which the word has been considered, because it is submitted that " constitution " in s. 5 of the Act of 1865 refers to the legislative machine and nothing else. While it is difficult to find any direct authority on this matter, *Attorney-General for New South Wales* v. *Trethowan* (1) goes a long way to support the view contended for. Further s. 192 cannot be legislation respecting the "powers" or "procedure" of the legislative council. Erskine May's Parliamentary Practice, 14th ed., at p. 42, states that "except in one respect, the surviving privileges of the House "of Lords and the House of Commons are justifiable on the "same grounds of necessity, as the privileges enjoyed by "legislative assemblies of the self-governing Dominions and "certain British colonies, under the common law as a legal "incident of their legislative authority," and again, at p. 47, "freedom of speech is a privilege essential to every free council "or legislature." Freedom of speech is a matter of inherent right of a legislative assembly and is implied in the creation of such an assembly: *Barton* v. *Taylor* (2). In *Gipps* v. *McElhone* (3) it was held that absolute privilege existed, and it was said "we cannot therefore grant a rule in respect of the "statement made in the Assembly, and our decision cannot be "too pronounced." That was a case of a representative legislature; there does not appear to be any authority which deals with a non-respreentative legislature, but it is submitted that this privilege is just as necessary in either case. *Kielley* v. *Carson* (4) is of some importance and relevance as indicating what are the limits of necessity for this purpose: "These "powers are granted by the very act of its establishment . . . . "we feel no doubt that such an Assembly has the right of "protecting itself from all impediments to the due course "of its proceeding" (5). All those matters really go back to and link up with *Barton* v. *Taylor* (2), and the basis of the submission is that the existence of this privilege is really a matter of inherent necessity. The next contention, based on cl. 8 of the Letters Patent of 1903, is that s. 192 of the Penal Code falls within the scope of the phrase "the peace, order and "good government of the colony": *Riel* v. *The Queen* (6). Lastly, it is quite wrong to say that this provision of the Code is repugnant to s. 5 of the Act of 1865; "repugnant" has been distinguished from the adjectives "different" or "diverse"; to be repugnant there must be found some express conflict which can be observed by examination of the statutes, and that does not exist here: *Union Steamship Co.*

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(1) [1896] A. C. 600, 610.

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(1) [1932] A. C. 526, 535–6.

(2) (1886) 11 App. Cas. 197, 203.

(3) (1881) 2 N. S. W. 18, 22.

(4) (1842) 4 Moo. P. C. 63.

(5) Ibid. 88.

(6) (1885) 10 App. Cas. 675, 678.

J. C.

1948

CHENARD AND CO. *v.* JOACHIM ARISSOL.

of New Zealand, Ld. v. *The Commonwealth* (1). Section 192 of the Code is not therefore rendered void and inoperative by s. 2 of the Act of 1865, but is a valid and effective law of the colony of Seychelles.

Pritt K.C. replied. The authorities and text-books cited for the respondent in support of the submission that this absolute privilege is inherently necessary for the proper conduct of this legislature do not establish that proposition: Berriedale Keith's Responsble Government in the Dominions (1928), vol. 1, pp. 366, 370–1. There is no authority of this Board for the proposition that such absolute protection is inherently necessary even to the functioning of a representative legislature in a self-governing colony, and there appears to be no authority for suggesting that a non-elected legislature has any such protection. *Gipps* v. *McElhone* (2) is not binding on the Board and is inconsistent with the limits laid down in *Barton* v. *Taylor* (3). The very fact that the legislature of Seychelles has legislated on this matter would appear to indicate that it did not believe that absolute protection is inherent. As to repugnancy, ss. 2 and 5 of the Act of 1865 between them prohibit this legislature from passing legislation of the kind to be found in s. 192 of the Penal Code.

Nov. 30. The judgment of their Lordships was delivered by LORD REID, who stated the facts set out above and continued: The only question raised in this appeal is whether absolute privilege attaches to statements made in the legislative council of Seychelles by a member of the council. The Seychelles Penal Code (Ordinance No. 10 of 1904) was enacted by the Governor by and with the consent of the legislative council and received Royal Assent on December 1, 1904. Section 192, sub-s. 1 (*a*), of this Code provides that no prosecution or action for defamation shall be competent against the President or a member of the legislative council for anything said or written by him in such capacity from his place in such council. It was admitted by counsel for the appellants that if this provision is intra vires the present appeal must fail.

The power of the Governor and legislative council of Seychelles to make laws flows from Letters Patent of August 31, 1903, by virtue of which the Seychelles Islands were erected into a separate colony. Clause 8 of the Letters Patent provides: "The Governor, by and with the advice and consent of the said

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(1) (1925) 36 C. L. R. 130, 148–9.

(2) (1881) 2 N. S. W. 18, 22.

(3) 11 App. Cas. 197, 203

"Legislative Council may make ordinances for the peace, "order and good government of the Colony, subject nevertheless to such rules as we have already made or may hereafter "make for their guidance by any Instruction under Our Sign "Manual and Signet." Their Lordships have not been referred to any Instructions relevant to the question at issue in this case.

A power to make ordinances for the peace, order and good government of a colony does not authorize alteration of the constitution or powers of the colonial legislature, but it does authorize the enactment of rights, privileges and immunities whether these be general or in favour of particular persons or classes of persons. Such a power has been held "to authorize "the utmost discretion of enactment for the attainment of "the objects pointed to," and a court will not inquire whether any particular enactment of this character does in fact promote the peace, order or good government of the colony (*Riel* v. *The Queen* (1)).

It was argued for the appellants that this general power to enact rights, privileges and immunities is limited by the provisions of ss. 2 and 5 of the Colonial Laws Validity Act, 1865 (28 & 29 Vict., c. 63). Section 2 provides that "any "colonial law which is or shall be in any respect repugnant to "the provisions of any Act of Parliament extending to the "colony . . . . shall, to the extent of such repugnancy . . . . "be . . . . void and inoperative." Section 5, after conferring on every colonial legislature power to make laws regarding courts of judicature, provides that "every representative "legislature shall . . . . have, and be deemed at all times "to have had, full power to make laws respecting the constitution, powers, and procedure of such legislature . . . ." A representative legislature is defined as one of which at least half the members are elected, and the legislative council of Seychelles is not a representative legislature within the meaning of this Act. The argument for the appellants was that, in view of the fact that the first part of s. 5 confers certain powers on every colonial legislature, the restriction of the grant of further powers by the latter part of the section to representative legislatures must be deemed to imply that non-representative legislatures are prohibited from exercising any of these further powers. Their Lordships do not accept this argument. The purpose of s. 5 is to confer rights, not to take them away. No right is conferred by s. 5 on any non-representative legislature to make laws respecting the constitution, powers or procedure of that legislature, and it may be that few, if any, non-representative legislatures have power to make laws which directly affect their own constitution, powers or procedure, but, if any such legislature has power from another source to make laws which touch any of these matters, those powers are not affected by the Colonial Laws Validity Act, 1865.

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(1) 10 App. Cas. 675.

In any event, their Lordships are of opinion that s. 192, sub-s. 1 (*a*), of the Seychelles Penal Code is not a law respecting the constitution, powers or procedure of the legislature of Seychelles within the meaning of s. 5 of the Colonial Laws Validity Act. It was argued that these words must be given a wide meaning so as to include all rights, privileges and immunities which attach to members of the legislature in their capacity as members, or at least all those rights, privileges and immunities which could properly be regarded as falling within the sphere of constitutional law. Their Lordships see no reason for so extending the ordinary meaning of the words of this section. None of those words is apt to include privileges or immunities of individual members of the legislature which protect them against actions in respect of their conduct as members. Accordingly, s. 192, sub-s. 1 (*a*), of the Seychelles Penal Code is within the power to legislate conferred on the legislature of that colony by Letters Patent, is not repugnant to any Act of Parliament and is therefore intra vires and valid.

A further question was fully argued—whether absolute privilege in respect of statements made in a legislative assembly by members of that assembly is so essential for free discussion and the proper conduct of business that the setting up of any legislative assembly necessarily implies the creation of that immunity. It has long been settled that the setting up of a colonial legislature does not vest in that legislature without express grant all the privileges of the House of the Imperial Parliament, but only such powers or privileges "as are "necessary to the existence of such a body, and the proper "exercise of the functions which it is intended to execute. "Whatever, in a reasonable sense, is necessary for these "purposes, is impliedly granted whenever any such legislative "body is established by competent authority": *Barton* v. *Taylor* (1) per Lord Selborne: *Kielley* v. *Carson* (2). There is little authority on the question whether absolute privilege must be held to have been impliedly granted: but in *Gipps* v.

(1) 11 App. Cas. 197, 203. (2) 4 Moo. P. C. 63.

J. C.
1948
Chenard and Co.
v.
Joachim Arissol.

McElhone (1) it was held that no action lay for defamation in respect of a question put by a member in the legislative assembly of New South Wales. Martin C.J. said: "There "is no doubt in my mind of the existence of this privilege, "and that it is absolute. It arises from inherent necessity. "The necessity is just as great here as in the Imperial "Parliament" (2). Their Lordships see no reason to differ from this opinion or to draw any distinction in this matter between representative and non-representative legislative assemblies.

Their Lordships will humbly advise His Majesty that this appeal be dismissed. The appellants will pay the costs of this appeal.

Solicitors for appellants: *Hy. S. L. Polak & Co.*
Solicitors for respondent: *H. B. Nisbet & Co.*

(1) (1881) 2 N. S. W. 18. (2) Ibid 21.

J. C.*
1948
Oct. 13.

[PRIVY COUNCIL]

LABOUR RELATIONS BOARD OF SASKATCHEWAN . . . . Appellant;

AND

JOHN EAST IRON WORKS, LIMITED Respondent;

AND

ATTORNEY-GENERAL FOR CANADA, ATTORNEY-GENERAL FOR SASKATCHEWAN, ATTORNEY-GENERAL FOR ONTARIO AND ATTORNEY-GENERAL FOR NOVA SCOTIA . Interveners.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Canada — Saskatchewan — Labour Relations Board — Not a court analogous to a " superior, district or county court "—Trade Union Act, 1944 (*St. Sask.* (*2nd Sess.*), *c.* 69) (*as amended by c.* 108 *of* 1945, *c.* 98 *of* 1946 *and c.* 102 *of* 1947), *s.* 5 (*e*)—*Intra vires—British North America Act*, 1867 (30 & 31 *Vict.*, *c.* 3), *s.* 96.

The jurisdiction exercisable by the appellant, the Labour Relations Board of Saskatchewan, set up by s. 4 of the Saskatchewan Trade Union Act, 1944, as amended, is not such as to constitute it a court within s. 96 of the British North America Act, 1867, and is not analogous to that of a superior, district or county court. The appellant board and its members were accordingly constitutionally established, and validly empowered under s. 5 (*e*) of the Act to make orders requiring the respondent company to reinstate, and pay the monetary loss suffered by, a number of its employees held by the appellant board to have been discharged contrary to the provisions of the Act.

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* *Present:* Lord Porter, Lord Simonds, Lord Oaksey, Lord Morton of Henryton and Lord MacDermott.

O. Martineau & Sons, Ld. v. *Montreal City* [1932] A. C. 113, *Toronto Corporation* v. *York Corporation* [1938] A. C. 415 and *Reference re Authority to Perform Functions Vested by the Adoption Act, Etc.* [1938] S. C. R. (Can.) 398, examined and discussed.

Judgment of the Court of Appeal for Saskatchewan [1948] 1 D. L. R. 652, reversed, and case remitted.

APPEAL (No. 13 of 1948) from a judgment of the Court of Appeal for Saskatchewan (December 15, 1947) which held that s. 5 (*e*) of the Trade Union Act, 1944, as amended, of Saskatchewan was ultra vires the jurisdiction of the legislature of the Province, and quashed, but without the issue of a writ or writs of certiorari, five orders of the Labour Relations Board of Saskatchewan (July 8, 1947).

The following facts, which were not in dispute, are taken from the judgment of the Judicial Committee. On May 15, 1947, the respondent, John East Iron Works, Ld., which carried on business in Saskatchewan, dismissed from its employment six of its employees. Thereupon the United Steel Workers of America, a trade union, complaining that the respondent in dismissing those employees had been guilty of an unfair labour practice within the meaning of s. 8, sub-s. 1 (*e*), of the Act, applied to the appellant, the Labour Relations Board of Saskatchewan, for orders requiring the respondent to reinstate them and to pay them the monetary loss suffered by them by reason of their dismissal. On June 10, 11 and 12, 1947, the union's applications were heard by the appellant board and in the course of the hearing the application in respect of one of the six employees was withdrawn. Both the union and the respondent appeared by counsel before the appellant board and called evidence. The appellant board, having heard evidence and argument, found that the respondent had discriminated "against each of the five employees in regard to tenure of "employment with a view to discouraging membership in or "activity in or for a labour organization (the applicant trade "union)" and had discharged them contrary to the provisions of the Act. On July 8, 1947, the appellant board issued orders requiring the respondent to reinstate each of the five employees and to pay each of them the sum of $200.80, being the sum which each of them would have received for his services if he had remained in the employment of the respondent continuously from May 23, 1947, (up to which date he had been paid) until the date of that decision.

On November 6, 1947, the respondent filed a notice of motion in the Court of Appeal for Saskatchewan giving notice of intention to move the court for an order quashing the orders of the appellant board. The notice stated six grounds of application of which only one was considered by the Court of Appeal and by their Lordships of the Judicial Committee. That ground was that the Act in so far as it purported (*a*) to make the orders of the appellant board enforceable as orders of the court of King's Bench, and (*b*) to give to the appellant board the power to make any order under s. 5 (*e*) of the Act was "ultra vires of the legislature of Saskatchewan as being "legislation setting up a superior, district or county court or "tribunal analogous thereto, the judges or members of which "are not appointed by the Governor-General of Canada in "Council, and as purporting to confer judicial power upon a "body not so appointed." On December 15, 1947, the Court of Appeal (Martin C.J. and Gordon, Macdonald and Anderson JJ.), upholding that plea, gave judgment quashing the orders of the appellant board. Hence this appeal to His Majesty in Council.

By s. 5 of the Trade Union Act the appellant board had power to make orders (*e*) requiring an employer to reinstate any employee discharged contrary to the provisions of that Act and to pay such employee the monetary loss suffered by reason of such discharge.

1948, July 19, 20, 21. *M. C. Shumiatcher K.C.* and *F. A. Brewin* (both of the Canadian Bar) for the appellant board. The question at issue is the constitutional validity of s. 5 (*e*) of the Act of 1944 in the light of the provisions of s. 96 and other sections of the British North America Act. The general purpose of the Act of 1944 was to prevent industrial unrest by requiring employees to bargain collectively with their employers. [Reference was made to the detailed provisions of the Act.] It is submitted, first, that the appellant board is not constituted as a court analogous to a superior, district or county court; secondly, none of the functions or the jurisdiction exercised by the board or vested in it by s. 5 (*e*) or any other part of the Act, were functions ever exercised by the courts named in s. 96 of the British North America Act, nor are they similar or analogous thereto. Thirdly, the court below erred in equating the remedy provided by s. 5 (*e*) of the Act to a specific performance of a contract of hiring or to damages for breach of such a contract, because, first, the remedy conferred by the Act is quite independent of, and unrelated to, the terms of the contract or its breach, and, secondly, the remedy is viewed by the legislature from an entirely different point of view from questions of contract, namely, as a matter of public policy in relation to industrial relations. The fourth submission is that so far as the functions exercised by the board are analogous to those exercised by any judicial tribunal in 1867 they are analogous and broadly conformable to functions of justices of the peace and inferior courts both in Great Britain and in Upper Canada; so that if analogy has to be looked at, the analogy is very much closer between that type of jurisdiction than the jurisdictions exercised by a superior court. The material authorities are *O. Martineau & Sons, Ld.* v. *Montreal City* (1), *Toronto Corporation* v. *York Corporation* (2) and *Reference re Authority to Perform Functions Vested by the Adoption Act, Etc.* (3). While the first, *Martineau's* case (1), is not directly applicable, it is helpful because it is submitted that no court of the Province ever had the right to make such orders as are now under consideration. The *Toronto Corporation* case (2) is of no value on the point whether the judicial functions, so far as they are judicial functions, of the board are analogous to any judicial functions exercised by a superior court in 1867; the court below appear to have put too broad a meaning on some of the words of that judgment, and the only reason why this case is referred to is because counsel in the court below relied on it and made a very great deal of the general words "judicial power." Reading the language of that case in relation to what was being discussed, it certainly does not go so far as to establish a general proposition that, because one finds judicial powers, it must fit within s. 96. I am not going to concede that the functions exercised in this present case were judicial, but, on the other hand, I do not want to make it part of my argument that they were not judicial: this function under s. 5 (*e*) was purely

(1) [1932] A. C. 113.
(2) [1938] A. C. 415.
(3) [1938] S. C. R. (Can.) 398.

in aid of administrative functions conferred by the Act. There are some obvious differences between this board's functions and most judicial tribunals; the word "reinstatement" itself provides a remedy which must include elements of policy, and is certainly not a judicial remedy. [Reference was also made to the judgment of the Court of Appeal for Ontario in the *Toronto Corporation* case (1).] That case does not by any means get the respondent here to where it has to get in relation to this particular case. The *Adoption Act* case (2) is not precisely in point, but contains a very full historical review.

The question to be asked in testing this matter is, are the functions vested in the board judicial functions such as were vested in superior, district or county courts? Or, as put in the *Toronto Corporation* case (1), are the questions which the board is required to determine purely judicial questions such as are normally determined by courts of justice? Whichever way the question is posed, the answer in respect of this particular Act is clearly "No." When this sort of subject-matter emerges as a subject-matter for jurisdiction, as a matter of practice it is found that in one jurisdiction after another it is committed to administrative tribunals and not to the courts. No superior court in England ever exercised a jurisdiction to require reinstatement of employees for reasons, or from the point of view, which is envisaged by this Act: *Rex* v. *National Arbitration Tribunal. Ex parte Horatio Crowther & Co. Ld.* (3). Not only in England, but in the United States and in Canada this subject-matter is almost automatically given to administrative tribunals: *National Labour Relations Board* v. *Jones and Laughlin Steel Corporation* (4), a case which arose in precisely the same manner as the case at bar: so far as it goes that case is helpful to indicate the way in which the Supreme Court of the United States viewed this parallel problem. In nearly all the Provinces of Canada, too, there is legislation very much in pari materia with the Act here in question, and conferring this jurisdiction on administrative tribunals not constituted in accordance with the provisions of s. 96. This particular power under s. 5 (*e*) is only one of a group of remedies designed to safeguard the general policy of protecting industrial peace within the province by encouraging collective bargaining; the section is allied to and associated with a number of other remedies which are of an administrative nature. This was an entirely new jurisdiction which emerged, and one not closely similar to any jurisdiction which existed in 1867, and if analogy has to be considered, then it is far closer to the jurisdiction exercised by justices of the peace, both in England and in Canada before confederation, in dealing with such matters as master and servant and apprenticeship. The proper approach to this matter is to view it from the point of view of the remedy, the object and the functions, which this board is called on to carry out, and even the procedure, and one finds a subject-matter which was never within the jurisdiction of the superior courts and which is not necessarily appropriate to such courts. There is no basis for saying that the function of a superior court has been usurped by the legislation in question, or that the pillars of justice have been undermined, or that any of the other things have been done which s. 96 was designed to prevent.

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(1) [1937] O. R. 177.
(2) [1923] S. C. R. (Can.) 398.
(3) [1948] 1 K. B. 424.
(4) (1937) 301 U. S. 1.

C. R. Magone K.C. (of the Canadian Bar) for the Attorney-General for Ontario, intervener, supported the argument for the appellant board and referred to the Labour Relations Act, 1944, of Ontario, and the regulations made thereunder which contained a provision similar to s. 5 (*e*) of the Saskatchewan Act, and also to the Industrial Relations and Disputes Investigation Act, 1948, of the Dominion Parliament to show the policy of the Dominion in this matter. If the judgment under appeal is right that last-mentioned Dominion Act must also be ultra vires. In view of the statutes giving powers to courts of summary jurisdiction to deal with employer-employee relationships it could not be said that adding a power requiring an employer to reinstate an employee would make that court of summary jurisdiction a superior court.

L. D. Currie K.C. and *T. D. MacDonald* (both of the Canadian Bar) for the Attorney-General for Nova Scotia, intervener, supported the arguments for the appellant board and for the Attorney-General for Ontario. The appellant board is purely administrative, and even if it possesses judicial functions they are validly conferred as being merely incidental to the administrative functions or as relating to a subject-matter never within the jurisdiction of a court within s. 96. We are intervening because Nova Scotia has a Trade Union Act which serves the same purpose as the Saskatchewan Act. Section 96 did not establish any new principle, and further, it was enacted against a background of legislative custom and practice whereby particular purposes were served by conferring powers in whole or in part on bodies or persons not within s. 96. The present matter is governed by the authority in the various Workmen's Compensation Act cases to the extent that the Workmen's Compensation Boards are administrative boards and that they are given rights and functions far wider in all their implications than are conferred by the various Trade Union Acts. The question of the jurisdiction of the Workmen's Compensation Boards has been before the Canadian courts on a number of occasions: *Tremblay* v. *Kowhanko* (1); *Attorney-General for Quebec* v. *Slanec & Grimstead* (2); *Dominion Canners* v. *Costanza* (3). In four workmen's compensation cases which came before the Privy Council the constitutional issue under s. 96 was not raised: *McMillan* v. *Canadian Northern Ry. Co.* (4); *Walpole* v. *Canadian Northern Ry. Co.* (5); *Workmen's Compensation Board* v. *Canadian Pacific Ry.* (6); *McColl* v. *Canadian Pacific Ry.* (7). More should not be read into *Martineau's* case (8) and the *Toronto Corporation* case (9) than was necessary for the consideration of the particular case.

F. A. Brewin also appeared for the Attorney-General for Saskatchewan, intervener, and adopted the argument for the appellant.

E. C. Leslie K.C. (of the Canadian Bar) and *Gahan* for the respondent. On the constitutional point it is submitted, first, that the power entrusted to the Labour Relations Board under s. 5 (*e*) was a judicial power. Secondly, if it were a judicial power, it was of that class which would ordinarily be exercised by the courts referred to in s. 96 of the British North America Act, or by tribunals analogous thereto. Here the appellant board has to determine certain facts and, speaking generally, where a tribunal is called on to make an authoritative finding of fact, and, having made it, to set forth the result which follows from that finding of fact as a matter of law then existing, on principle that is a judicial power: *Shell Co. of Australia* v. *Federal Commissioner of Taxation* (10); *Rola Company (Australia) Proprietary, Ld.* v. *The Commonwealth and Another* (11). This power under s. 5 (*e*) is not an administrative function. The board has, as found by the court below, certain administrative duties to perform, but it is submitted that the power given to determine this dispute between the employer, on the one hand, and a trade union on behalf of the employee, on the other, is a judicial power. In this connexion reference may also be made to the two Workmen's Compensations Acts of Saskatchewan, cc. 302 and 303 of R. S. S. 1940, and it is submitted, to take but one of the cases cited by counsel for the Attorney-General for Nova Scotia, that the question of the appointment of the Workmen's Compensation Board had no relevance whatever to the action in *Walpole* v. *Canadian Northern Ry. Co.* (1) and could not have been raised, and the other cases cited are similar. The power conferred on the board by s. 5 (*e*) is a judicial one which cannot validly be conferred by the legislature of Saskatchewan on a body whose members are appointed by the Government of Saskatchewan. Next, this was a judicial power that was exercised by the courts coming within s. 96, and the power entrusted to the board is one which the Saskatchewan legislature could not validly confer on it. It was held in *Burk* v. *Tunstall* (2) that "it is competent to the Province to create ordinary courts and "to fix their jurisdiction, but not to appoint any officers with "other than administrative powers." The pertinent parts of that case were approved in *O. Martineau's* case (3) and in the *Adoption Act* case (4). Courts of summary jurisdiction which had jurisdiction in civil as well as criminal matters were in existence at confederation: *In re Small Debts Act* (5). *Re McLean Gold Mines, Ld. and Attorney-General for Ontario* (6) concerned the jurisdiction given to the mining commissioner; he was not exercising all the powers of the superior court, but was limited to mining and mining rights. The powers under attack in *O. Martineau's* case (3) were saved by the operation of s. 129 of the British North America Act; as late, therefore, as 1932, the power which the Province had of appointing courts or tribunals or entrusting the exercise of judicial power to anybody rested on s. 129, which continued the courts which existed before confederation. It is vastly different to entrust powers to a body which is subject to the supervisory control of a superior court and to entrust them to a body from which that control is expressly taken away.

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(1) (1920) 51 D. L. R. 174.
(2) (1933) 2 D. L. R. 289.
(3) [1923] S. C. R. (Can.) 46.
(4) [1923] A. C. 120.
(5) [1923] A. C. 113.
(6) [1920] A. C. 184.
(7) [1923] A. C. 126.
(8) [1932] A. C. 113.
(9) [1938] A. C. 415.
(10) [1931] A. C. 275, 295–7.
(11) (1944) 69 C. L. R. 185, 191.

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(1) [1923] A. C. 113.
(2) (1890) 2 B. C. R. 12.
(3) [1932] A. C. 113.
(4) [1938] S. C. R. (Can.) 398.
(5) (1896) 5 B. C. R. 246, 253.
(6) (1923) 54 O. L. R. 573, 574.

J. C.
1948

Labour Relations Board of Saskatchewan
v.
John East Iron Works, Ld.

[Reference was made to the nature of the different courts that existed in Canada at the time of confederation: *Rimmer* v. *Hannon* (1).] The superior court was one of province-wide jurisdiction and unlimited in amount, and the Labour Relations Board, which has also province-wide jurisdiction unlimited in amount, is certainly analogous to a superior court. The pre-confederation courts dealt with the matters confided to the board by s. 5 (*e*) because they dealt with master and servant, with damages for loss of employment and matters of that kind. The whole basis and substratum of the present proceedings is the contract of employment between these five men and the respondent company. There has been transferred, therefore, to the board with regard to contracts of employment a jurisdiction which was formerly exercised by the judges of the superior, district or county courts.

B. MacKenna for the Attorney-General for Canada, intervener. The submission for the respondent that the powers conferred by s. 5 (*e*) are judicial is adopted, and may be summarized as follows: (*a*) the body could be called into action by either a trade union or by the employee affected under reg. 4 of the board's regulations; (*b*) these regulations do not provide for the board to take action under s. 5 (*e*) except on the application of a trade union or an employee affected; (*c*) the board can decide controversies between subjects; whether the employee has suffered loss and, if so, how much; virtually its decisions are binding; (*d*) all the powers of the King's Bench are available to carry these decisions into execution; and (*e*) if the board has any discretion as to whether it will act under s. 5 (*e*) it is one which must be exercised on judicial principles; in other words, the board could not decide a particular case as a matter of policy. It is conceded that the board has important administrative functions, but that is immaterial: *Toronto Corporation* v. *York Corporation* (2). The intention of s. 96 was that the impartiality and independence of the provincial judiciary should be secured by vesting in the Governor-General the power of appointment of judges to more important tribunals. That intention would be defeated if the Province in creating new tribunals could give them jurisdiction comparable in importance with that of the tribunals described in s. 96 and appoint judges to those tribunals. There are four aspects in which the matter of the jurisdiction of a tribunal can be considered: (i.) the nature of the rights which

(1) (1921) 60 D. L. R. 637.

(2) [1938] A. C. 415.

can be enforced by the courts, including any limitation on the value of the rights enforceable; (ii.) the nature of the remedies which the court can give; (iii.) the territorial limits of the jurisdiction; and (iv.) the independence of the tribunal or its subordination to other tribunals. If a jurisdiction is unlimited in amount, is subject to no local limits, and is administered by a tribunal free from the control of any other tribunal, and can grant both specific performance and damages as remedies, it is one of the more important tribunals distinguished by s. 96 from the other inferior and less important tribunals in the Province. It does not matter, in considering the nature of a jurisdiction, whether the right which the tribunal is to administer is the creature of contract or of statute; it is the right that matters, and not the words used in creating it: *Workmen's Compensation Board* v. *Canadian Pacific Ry.* (1). The distinction which it was sought to draw between specific performance and reinstatement is without substance. There are certain very obvious differences between the jurisdiction of the new board and that of justices of the peace in 1867; first, justices of the peace were subject to the control of the Supreme Court of Outer Canada; secondly, the jurisdiction of the justices of the peace was limited locally; thirdly, their powers were limited in amount; and lastly, they had no power to compel the employer specifically to perform the contract. The question is whether the jurisdiction given to the board is an important or a relatively unimportant one, and more closely resembling that of inferior tribunals: *In re the Small Debts Act of British Columbia* (2); *Re the Public Utilities Act* (3); *In re Small Debts Recovery Act* (4). A new right and a new remedy in relation to master and servant is given by the Act of 1944, but that neither helps nor hinders my argument. One gets no assistance from *National Labour Relations Board* v. *Jones and Laughlin Steel Corporation* (5) in considering in the present case whether there was, as is submitted, a conferring of judicial power on the board in contravention of s. 96. It was held in *Tremblay* v. *Kowhanko* (6) that the Workmen's Compensation Board was not a court in any sense, but was an administrative body; it was not constituted to decide a lis between parties; those considerations serve to distinguish it from the present board. See

(1) [1920] A. C. 184.
(2) (1896) 5 B. C. R. 246.
(3) (1917) 1 W. W. R. 9, 27.
(4) (1917) 3 W. W. R. 698.
(5) (1937) 301 U. S. 1.
(6) (1920) 51 D. L. R. 174.

J. C.
1948
Labour Relations Board of Saskatchewan v. John East Iron Works, Ld.

also *Attorney-General for Quebec* v. *Slanec & Grimstead* (1).

M. C. Shumiatcher K.C. replied, and reviewed a number of the authorities already cited. With regard to the submission for the respondent that the board is a superior court or tantamount to such in view of the fact that its jurisdiction is unlimited, the remedies which are available to the parties are in fact very much restricted. They are restricted in that only actual monetary loss may be ordered to be paid by the board, and, secondly, in that the board is limited to the making of orders for reinstatement. It has no general power to issue injunctions as such or orders of a type issued by the courts within the contemplation of s. 96.

Oct. 13. The judgment of their Lordships was delivered by Lord Simonds. In this appeal, which is brought from a judgment of the Court of Appeal for Saskatchewan, a question of constitutional importance is raised whether certain provisions of the Trade Union Act, 1944, of the Province of Saskatchewan, which will be referred to as "the Act," are within the legislative powers of that Province under the British North America Act, 1867. The facts of the case on which the question arises are not in dispute and can be shortly stated. [His Lordship then stated the facts set out above and continued:] It is now necessary to recur to the terms of the Act the validity of which is impeached, but before doing so it is proper to recall the salient provisions of the British North America Act, 1867. Under that Act, while by s. 92 there was exclusively reserved to the provincial legislatures legislative power in respect of "(14.) The Administration of Justice in the Province, including "the Constitution, Maintenance, and Organization of Provincial "Courts, both of Civil and of Criminal Jurisdiction, and "including Procedure in Civil matters in those Courts," yet by Part VII, entitled "Judicature," the following provisions are made, which must be stated in full:

> "Section 96. The Governor General shall appoint the "Judges of the Superior, District, and County Courts in each "Province, except those of the Courts of Probate in Nova "Scotia and New Brunswick.
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> "Section 97. Until the Laws relative to Property and "Civil Rights in Ontario, Nova Scotia, and New Brunswick, "and the Procedure of the Courts in those Provinces, are "made uniform, the Judges of the Courts of those Provinces

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(1) (1933) 2 D. L. R. 289.

" appointed by the Governor General shall be selected from
" the respective Bars of those Provinces.

" Section 98. The Judges of the Courts of Quebec shall
" be selected from the Bar of that Province.

" Section 99. The Judges of the Superior Courts shall
" hold office during good Behaviour, but shall be removable
" by the Governor General on Address of the Senate and
" House of Commons.

" Section 100. The Salaries, Allowances, and Pensions
" of the Judges of the Superior, District, and County Courts
" (except the Courts of Probate in Nova Scotia and New
" Brunswick), and of the Admiralty Courts in Cases where
" the Judges thereof are for the time being paid by salary,
" shall be fixed and provided by the Parliament of Canada."

It is in the application of these sections to the constitution and functions of the appellant board that the problem lies which their Lordships have to determine, and they would at the outset emphasize that its solution is not to be found by answering the question whether in certain of its functions the appellant board exercises judicial power. It may do so and yet have constitutional validity. For, whatever doubts may at one time have been entertained, two propositions cannot now be challenged, (1.) that it is not only courts which are designated " superior " or " district " or " county " courts that are within the ambit of the sections that have been cited, (2.) that not all tribunals which exercise judicial power are within their ambit. It is this consideration that led the respondent in challenging the orders made by the appellant board to use the expression " a tribunal analogous thereto," thus echoing the language used by Lord Atkin in delivering the opinion of their Lordships in *Toronto Corporation* v. *York Corporation* (7). The question for determination is therefore a double one, (*a*) whether the appellant board exercises judicial power and (*b*), if so, whether in that exercise it is a tribunal analogous to a superior, district or county court.

The Act, which is c. 69 of the Statutes of Saskatchewan, 1944 (Second Session), as amended by c. 108 of the Statutes of 1945, c. 98 of the Statutes of 1946 and c. 102 of the Statutes of 1947, had as its original title " An act respecting " Trade Unions and the Right of employees to organize in " Trade Unions of their own choosing for the purpose of " bargaining collectively with their employers." Herein its

(1) [1938] A. C. 415.

purpose is apparent, a purpose, it may be observed, that would have sounded strange to the ears of the legislature of 1867.

Section 2 contains certain definitions, of which the following may be noted:

" 'bargaining collectively' means negotiating in good " faith with a view to the conclusion of a collective bargaining " agreement . . . . and the negotiating from time to time " for the settlement of disputes and grievances of employees " covered by the agreement.

" 'board' means the Labour Relations Board constituted " by this Act.

" 'collective-bargaining agreement' means an agreement " in writing between an employer and a trade union setting " forth the terms and conditions of employment or con" taining provisions in regard to rates of pay, hours of work " or other working conditions.

" 'employee' means any person in the employment of an " employer, except any person having authority to employ " or discharge employees or regularly acting on behalf of " management in a confidential capacity, and includes any " person on strike or locked out in a current labour dispute " who has not secured permanent employment elsewhere."

There are definitions also of "employer," "employer's "agent," "labour organization," "minister" and "trade "union" which need not be set out.

Section 3 gives employees the right to organize in trade unions and to bargain collectively through representatives of their own choosing, and provides that the representatives selected for the purpose of bargaining collectively by the majority of employees in a unit appropriate for such purpose shall be the exclusive representatives of all employees in such unit for the purpose of bargaining collectively. Section 4 (which is all important for the purpose of this appeal) prescribes that there shall be a board, to be known as the Labour Relations Board, composed of seven members appointed by the Lieutenant-Governor in Council at such salaries or remuneration as he deems fit, that the Lieutenant-Governor in Council shall name a chairman and vice-chairman of the board, and that the members of the board shall be equally representative of organized employees and employers, and, if the Lieutenant-Governor in Council deems it desirable, of the general public. The same section lays down rules of procedure for the board.

Section 5 defines the power of the board. It has power to make orders

> " (*a*) determining whether the appropriate unit of " employees for the purpose of bargaining collectively shall " be an employer unit, craft unit, plant unit or a sub- " division thereof or some other unit ;
>
> " (*b*) determining what trade union, if any, represents a " majority of employees in an appropriate unit of employees ;
>
> " (*c*) requiring an employer to bargain collectively ;
>
> " (*d*) requiring any person to refrain from violations of this " Act or from engaging in any unfair labour practice ;
>
> " (*e*) requiring an employer to reinstate any employee " discharged contrary to the provisions of this Act and to " pay such employee the monetary loss suffered by reason " of such discharge ;
>
> " (*f*) requiring an employer to disestablish a company " dominated organization ;
>
> " (*g*) rescinding or amending any order or decision of the " board."

Sections 6 and 7 give directions as to the mode of ascertaining what trade union represents a majority of employees in an appropriate unit. Section 8 defines in great detail what is an unfair labour practice for (1.) an employer or his agent, and (2.) an employee or any person acting on behalf of a labour organization respectively. It is necessary for the present purpose to refer only to sub-s. 1 (*e*), by which it is made an unfair labour practice for an employer or his agent : " to " discriminate in regard to hiring or tenure of employment or " any term or condition of employment or to use coercion or " intimidation of any kind with a view to encouraging or " discouraging membership in or activity in or for a labour " organization or participation of any kind in a proceeding " under this Act ; and if an employer or employer's agent " discharges an employee from his employment and it is alleged " by a trade union that such employer or employer's agent has " thereby committed an unfair labour practice within the " meaning of this clause, it shall be presumed, unless the " contrary is proved, that such employer or employer's agent " has discriminated against such employee " in manner aforesaid. Section 9 provides that a certified copy of any order or decision of the board shall within one week be filed in the office of the registrar of the court of King's Bench and shall thereupon be enforceable as a judgment or order of the court, but the board may nevertheless rescind or vary any such order.

Section 10 provides (1.) that in any application to the court arising out of the failure of any person to comply with the terms of any order filed in pursuance of s. 9, the court may refer to the board any question as to the compliance or non-compliance of such person or persons with the order of the board, and (2.) that the application to enforce any order of the board may be made to the court by and in the name of the board, any trade union affected or any interested person, and on such application being heard the court shall be bound absolutely by the findings of the board and shall make such order or orders as may be necessary to cause every party with respect to whom the application is made to comply with the order of the board, and (3.) that the board may in its own name appeal from any judgment, decision or order of any court affecting any of its orders or decisions. Section 11 provides for the imposition of penalties on any person who takes part in, aids, abets, counsels or procures any unfair labour practice, s. 12 for the appointment by the Lieutenant-Governor in Council in certain events of the controller of a business, and s. 13 for the making of rules and regulations. Section 14 gives to the board and the members thereof the power of a commissioner under the Public Inquiries Act, with liberty to receive and accept such evidence and information on oath, affidavit or otherwise as in its discretion it may deem fit and proper whether admissible as evidence in a court of law or not. Finally, s. 15 enacts that there shall be no appeal from an order or decision of the board under the Act and that the board shall have full power to determine any question of fact necessary to its jurisdiction and that its proceedings, orders and decisions shall not be reviewable by any court of law or by any certiorari, mandamus, prohibition, injunction or other proceeding whatsoever.

Their Lordships have thought it proper to set out in some detail the relevant provisions of the impugned Act inasmuch as on the question that they must determine it is inevitable that fine distinctions should be drawn. The borderland in which judicial and administrative functions overlap is a wide one, and the boundary is the more difficult to define in the case of a body such as the appellant board, the greater part of whose functions are beyond doubt in the administrative sphere. Nor can a more difficult question be posed (but their Lordships can find no easier test) than to ask whether one court is "analogous" to another. The question for determination has been stated as a double one. And so, logically, it is. For it should first be asked whether the appellant board when it makes an order under s. 5 (*e*) of the Act is exercising judicial power. If it is not, then it is not a court at all and cannot be a "superior, district or county court," or a court analogous thereto. Their Lordships, however, think it unnecessary finally to answer this question. Without attempting to give a comprehensive definition of judicial power, they accept the view that its broad features are accurately stated in that part of the judgment of Griffith C.J. in *Huddart, Parker & Co. Proprietary, Ld.* v. *Moorhead* (1) which was approved by this Board in *Shell Company of Australia, Ld.* v. *Federal Commissioner of Taxation* (2). Nor do they doubt, as was pointed out in the latter case, that there are many positive features which are essential to the existence of judicial power, yet by themselves are not conclusive of it, or that any combination of such features will fail to establish a judicial power if, as is a common characteristic of so-called administrative tribunals, the ultimate decision may be determined not merely by the application of legal principles to ascertained facts but by considerations of policy also. Whether in the present case the power exercised by the appellant board under s. 5 (*e*) of the Act is a judicial power, their Lordships do not decide. For the elements in its constitution and functions which at least make it doubtful whether it is in the strict sense a court exercising judicial power at all appear to lead conclusively to the opinion that it is not a superior, district or county court or a court analogous thereto.

It is a truism that the conception of the judicial function is inseparably bound up with the idea of a suit between parties, whether between Crown and subject or between subject and subject, and that it is the duty of the court to decide the issue between those parties, with whom alone it rests to initiate or defend or compromise the proceedings. Here at once a striking departure from the traditional conception of a court may be seen in the functions of the appellant board. For, as the Act contemplates and the rules made under it prescribe, any trade union, any employer, any employers' association or any other person directly concerned may apply to the board for an order to be made (*a*) requiring any person to refrain from a violation of the Act or from engaging in an unfair labour practice, (*b*) requiring an employer to reinstate an employee discharged contrary to the provisions of the Act and to pay

(1) (1908) 8 C. L. R. 330, 357. (2) [1931] A. C. 275.

such employee the monetary loss suffered by reason of such discharge, (*c*) requiring an employer to disestablish a company-dominated organization or (*d*) requiring two or more of the said things to be done. Other rules provide for the discharge by the board of other functions. It is sufficient to refer only to (*b*) supra, which clearly illustrates that, while the order relates solely to the relief to be given to an individual, yet the controversy may be raised by others without his assent and, it may be, against his will, for the solution of some far-reaching industrial conflict. It may be possible to describe an issue thus raised as a " lis " and to regard its determination as the exercise of judicial power. But it appears to their Lordships that such an issue is indeed remote from those which at the time of confederation occupied the superior or district or county courts of Upper Canada.

In the Court of Appeal for Saskatchewan the learned Chief Justice (in whose opinion the other judges concurred) accepted the view that the board exercised a judicial power analogous to that of the courts named on the ground that such courts always had jurisdiction in connexion with the enforcement of contracts of hiring and awarding damages for the breaches thereof. But, as their Lordships think, this view ignores the wider aspects of the matter. The jurisdiction of the board under s. 5 (*e*) is not invoked by the employee for the enforcement of his contractual rights : those, whatever they may be, he can assert elsewhere. But his reinstatement, which the terms of his contract of employment might not by themselves justify, is the means by which labour practices regarded as unfair are frustrated and the policy of collective bargaining as a road to industrial peace is secured. It is in the light of this new conception of industrial relations that the question to be determined by the board must be viewed, and, even if the issue so raised can be regarded as a justiciable one, it finds no analogy in those issues which were familiar to the courts of 1867. This matter may be tested in another way. If the appellant board is a court analogous to the superior and other courts mentioned in s. 96 of the British North America Act, its members must not only be appointed by the Governor-General but must be chosen from the Bar of Saskatchewan. It is legitimate, therefore, to ask whether, if trade unions had in 1867 been recognized by the law, if collective bargaining had then been the accepted postulate of industrial peace, if, in a word, the economic and social outlook had been the same in

1867 as it became in 1944, it would not have been expedient to establish just such a specialized tribunal as is provided by s. 4 of the Act. It is as good a test as another of "analogy" to ask whether the subject-matter of the assumed justiciable issue makes it desirable that the judges should have the same qualifications as those which distinguish the judges of superior or other courts. And it appears to their Lordships that to this question only one answer can be given. For wide experience has shown that, though an independent president of the tribunal may in certain cases be advisable, it is essential that its other members should bring an experience and knowledge acquired extra-judicially to the solution of their problems. The members of the board are to be equally representative of organized employees and employers and in a certain event of the general public. That does not mean that bias or interest will lead them to act otherwise than judicially, so far as that word connotes a standard of conduct, but it assuredly means that the subject-matter is such as profoundly to distinguish such a tribunal from the courts mentioned in s. 96. It is relevant, too, to consider the alleged judicial function of the board under s. 5 (*e*) of the Act in relation to its other duties. It is not impossible, as *Toronto Corporation* v. *York Corporation* (1) illustrates, for a body to be validly established for administrative purposes and yet to be unconstitutionally clothed with a judicial power. It is not, therefore, conclusive of the constitutionality of the board that in the main it is an administrative instrument and that its judicial function is designed to implement administrative policy. But, once more seeking an analogy with the courts mentioned in s. 96, their Lordships must observe that the feature of the board's constitution, which is conspicuously shown in the power vested in it by s. 10, sub-s. 3, of the Act to appeal in its own name from any judgment of any court affecting any of its orders or decisions, emphasizes the dissimilarity to those courts.

On behalf of the respondent stress was laid on the provisions of s. 15 of the Act. It was urged that a tribunal whose decisions were not subject to appeal and whose proceedings were not reviewable by any court of law or by any certiorari or other proceeding whatsoever, must be regarded as a "superior" court or a court analogous thereto. But the same considerations which make it expedient to set up a specialized tribunal may make it inexpedient that that tribunal's decisions should be reviewed by an ordinary court. It does not for that reason become itself a "superior" court. Nor must its immunity from certiorari or other proceedings be pressed too far. It does not fall to their Lordships on the present appeal to determine the scope of that provision, but it seems clear that it would not avail the tribunal if it purported to exercise a jurisdiction wider than that specifically entrusted to it by the Act. At this stage their Lordships reach the conclusion that the jurisdiction exercisable by the board is not such as to constitute it a court within s. 96 of the British North America Act. They do not think it necessary to consider whether it is a jurisdiction more nearly analogous to that exercised at the time of confederation by justices of the peace—a matter to which much argument was directed—nor would they pursue the comparison with the jurisdiction of the Workmen's Compensation Board, which was also pressed on them by counsel. It is sufficient to say that it is not, in their opinion, analogous to that of a superior, district or county court.

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(1) [1938] A. C. 415.

But before parting with the case their Lordships think it proper to observe on two cases which have recently come before them, *O. Martineau* v. *City of Montreal* (1) and *Toronto Corporation* v. *York Corporation* (2), of which passing mention has already been made, and more particularly also upon *Re Adoption Act of Ontario* (3), in which will be found a judgment of Sir Lyman Duff, lately Chief Justice of Canada, so exhaustive and penetrating both in historical retrospect and in analysis of this topic, that their Lordships would respectfully adopt it as their own, so far as it is relevant to the present appeal. In *Martineau's* case (1) where the question was as to the constitutionality of the Quebec Public Service Commission in that its members exercised certain judicial functions but were not appointed by the Governor-General, it would appear that the decision of this Board in favour of the validity of the awards made by the commission was largely determined by the fact that this commission was itself the successor of a body which was in existence at the date of confederation and then exercised a similar jurisdiction. Apart, therefore, from any other consideration its constitutionality appeared to be preserved by s. 129 of the British North America Act. But in the course of delivering the judgment of the Board Lord Blanes-

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(1) [1932] A. C. 113.
(2) [1938] A. C. 415.
(3) [1938] S. C. R. (Can.) 398.

J. C.

1948

LABOUR RELATIONS BOARD OF SASKATCHEWAN *v.* JOHN EAST IRON WORKS, LD.

burgh, referring to a decision of Drake J. in a British Columbia case, *Burk* v. *Tunstall* (1), approved the following words used by that learned judge: ". . . . But in the section itself, after "the special courts thus named, the Courts of Probate in "Nova Scotia and New Brunswick are excepted from the "operation of the clause, thus showing that s. 96 was intended "to be general in its operation." It appears from cases cited upon the present appeal and from the judgment of Duff C.J. in *Re the Adoption Act* (2) that this passage has been made the basis for the proposition that it is incompetent for provincial legislatures to legislate for the appointment of any officer of any provincial court exercising other than ministerial functions. Their Lordships agree with the learned Chief Justice in thinking that this is a wholly unwarranted view of *Martineau's* case (3), which was directed neither to courts of summary jurisdiction of any kind nor to tribunals established for the exercise of jurisdiction of a kind unknown in 1867.

In *Toronto Corporation* v. *York Corporation* (4) it was decided that the Ontario Municipal Board was primarily an administrative body but that certain sections of the Act by which it was established purported to clothe it with the functions of a court and to vest in it judicial powers, and that pro tanto, since its members were not appointed by the Governor-General, the Act was invalid. But it is clear that in that case the question did not arise for argument, as it arises in the case under appeal, whether on the assumption that judicial power was vested in the board, the board was thereby brought within the ambit of s. 96. It is true that at an early stage in the judgment delivered by Lord Atkin the question was asked "Is, then, the Municipal Board of Ontario a superior "court, or a tribunal analogous thereto?" But it seems to have been assumed by their Lordships that if the power vested in it was judicial, it was such a tribunal, for (as Duff C.J. pointed out in the case cited) it is obvious that their Lordships did not consider, because presumably there was no occasion to do so, the distinction between the courts that come within the intendment of s. 96 of the British North America Act and other courts and tribunals.

Finally, in *Re the Adoption Act* (2) it fell to the Supreme Court of Canada to determine the constitutionality of a number of Acts which beyond question purported to vest judicial

(1) (1890) 2 B. C. R. 12.
(2) [1938] S. C. R. (Can.) 398.
(3) [1912] A. C. 113.
(4) [1938] A. C. 415.

J. C.
1948
Labour Relations Board of Saskatchewan v. John East Iron Works, Ld.

power in various judicial officers to be designated by the Lieutenant-Governor in Council. In point of substantive law the subject-matter of these Acts lay within the legislative power of the Provinces just as does the subject-matter of the present appeal. The question then was, whether the judicial bodies thus established were courts within the intendment of s. 96, and the answer was in the negative. It was sufficient for the purpose of that case for the learned Chief Justice to pose this question "Does the jurisdiction conferred upon "magistrates under these statutes broadly conform to a type "of jurisdiction generally exercisable by courts of summary "jurisdiction rather than the jurisdiction exercised by courts "within the purview of s. 96?" and, answering that question in the affirmative, to pronounce for the validity of the statutes. And, if in this case the same alternative was presented to their Lordships, they might well answer it in the same way, for at least from the earliest times the administrative and judicial duties of justices of the peace have been curiously blended: that feature a court of summary jurisdiction has in common with the appellant board. But they would prefer to put the question in another way, which may be more helpful in the decisions of similar issues, namely, "Does the jurisdiction "conferred by the Act on the appellant board broadly conform "to the type of jurisdiction exercised by the superior, district "or county courts?" In their view, for the reasons already stated, it does not do so. They do not think it necessary to say whether it conforms more nearly to any other jurisdiction existing in 1867.

Their Lordships conclude that the judgment of the Court of Appeal for Saskatchewan cannot be maintained. But that does not end the matter. For apart from the plea of unconstitutionality of the Act the respondent claimed to have the orders of the appellant board quashed on two other grounds, (*a*) that in their assessment of the monetary loss suffered by the discharged employees the board proceeded on an error in law so fundamental as to deprive the board of jurisdiction, and (*b*) that the conduct of the chairman of the board disqualified him by bias, or the reasonable apprehension of bias, from taking part in the inquiry and the board as constituted at the hearing was thereby also disqualified. The Court of Appeal, being in favour of the respondent on the constitutional plea, did not think it necessary to consider these grounds, and their Lordships are not prepared to do so until at least the Court of

J. C.
1948
LABOUR RELATIONS BOARD OF SASKATCHEWAN
v.
JOHN EAST IRON WORKS, LD.

Appeal has pronounced on them. Therefore, while the present appeal must be allowed, the case must be remitted to the Court of Appeal for re-hearing on the footing that the Act is not ultra vires and that the board and its members are constitutionally established. Their Lordships will humbly advise His Majesty accordingly.

The respondent must pay the costs of the appellant board of this appeal and in the Court of Appeal of Saskatchewan but in the latter court only so far as they may relate to the constitutional issues.

Solicitors for the appellant board and for the Attorneys-General for Saskatchewan and Ontario: *Lawrence Jones & Co.*

Solicitors for the respondent: *Blake & Redden.*

Solicitors for the Attorney-General for Canada: *Charles Russell & Co.*

Solicitors for the Attorney-General for Nova Scotia: *Burchells.*

[HOUSE OF LORDS]

H. L. (E.)*
1948
June 17, 21, 22; *Dec.* 9.

LONDON PASSENGER TRANSPORT BOARD . . . . . . APPELLANTS;

AND

UPSON AND ANOTHER . . . . RESPONDENTS.

Highway—Pedestrian crossing places—Precedence of foot passengers over vehicular traffic—Crossing place controlled by light signals—Duty of drivers of vehicles approaching crossing—Pedestrian Crossing Places (Traffic) Regulations, 1941 (*St. R. & O.* 1941, *No.* 397), *reg.* 3.

By the Pedestrian Crossing Places (Traffic) Regulations, 1941, reg. 3: "The driver of every vehicle approaching a crossing shall, "unless he can see that there is no passenger thereon, proceed at "such a speed as to be able if necessary to stop before reaching such "crossing."

A taxi-cab standing on a pedestrian crossing controlled by lights obscured the view of the driver of a motor-bus approaching, with the lights in its favour, at a speed of 15 miles an hour, so that he did not see a foot-passenger on the crossing until she emerged into the clear space 9 feet in front of the motor-bus, which struck and injured her.

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* *Present:* LORD PORTER, LORD WRIGHT, LORD UTHWATT, LORD DU PARCQ and LORD MORTON OF HENRYTON.

H. L. (E.)

1948

LONDON PASSENGER TRANSPORT BOARD *v.* UPSON.

Held that reg. 3 applied to a crossing place controlled by lights and that the driver was in breach of the statutory duty imposed thereby since he had not a clear view of the crossing and yet failed to "proceed at such a speed as to be able if necessary to stop before "reaching the crossing."

Observations in *Chisholm* v. *London Passenger Transport Board* [1939] 1 K. B. 426, 448, considered and approved by Lord Wright, Lord Uthwatt, Lord du Parcq and Lord Morton of Henryton.

Decision of the Court of Appeal (sub nom. *Upson* v. *London Passenger Transport Board*) [1947] K. B. 930 affirmed.

APPEAL from the Court of Appeal (Cohen and Asquith L.JJ., Lord Greene M.R. dissenting).

Baker Street, London, running north and south, was provided with pedestrian crossing places at the point where it was intersected at right angles by Blandford Street on the east and King Street on the west. While on the crossing from the north-east to the north-west corner at the intersection, the first respondent, Annie Upson, was struck and injured by a motor-bus, which approached without its horn being sounded and which stopped with its front wheels on the crossing. It was daylight and the weather was fine and clear. The first respondent and her husband Walter Upson, the second respondent, brought an action against the appellants, the London Passenger Transport Board, the owners of the motor-bus, claiming damages for negligence. In the statement of claim they did not plead the Pedestrian Crossing Places (Traffic) Regulations, 1941, made under s. 18 of the Road Transport Act, 1934, or allege that the driver of the omnibus was in breach of them, although it was alleged, in the particulars of negligence, that he failed to give the first respondent "free "and uninterrupted right of passage" over a "recognized "pedestrian crossing."

The manner in which the case was decided in the King's Bench Division and the Court of Appeal was stated by LORD PORTER as follows: The case was tried by Humphreys J. in the first instance, who found the driver of the omnibus guilty of negligence at common law. In the Court of Appeal Cohen and Asquith L.JJ. reversed this finding but held the driver guilty of a breach of the Pedestrian Crossing Places (Traffic) Regulations, 1941. Lord Greene M.R. dissented and attached neither blame nor liability to the driver or the appellants. The facts found by Humphreys J. were as follows (1): "This "action arises out of an accident which took place on "November 23, 1945, where Baker Street is crossed by Bland-

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(1) [1947] K. B. 930, 940.

H. L. (E.)

1948

London Passenger Transport Board v. Upson.

"ford Street. The crossing from one side of Baker Street "to the other is controlled by traffic lights. There is also a "refuge in the centre of the road, the nearest point of which is "17 ft. 9 ins. from the kerb and there is a pedestrian crossing. "The plaintiff was minded to cross Baker Street from the "north-eastern corner to the north-western corner and she "proposed to cross by the refuge. As far as I can see, she "walked in the middle of the pedestrian crossing. She safely "negotiated something like 15 ft. of that 17 ft. 9 ins. and then "she was knocked down and injured by the off-side front "wing of one of the defendants' omnibuses which was coming "south down Baker Street. There was a taxi-cab drawn up "close to the kerb with its wheels actually on and blocking "part of the pedestrian crossing. The evidence was that the "taxi-driver was off his seat and was actually opening the "door for a fare, whom he had stopped to pick up. The "effect of that was that the plaintiff's view of the oncoming "south-bound traffic in Baker Street, the traffic dangerous "from her point of view, was masked by the width of the taxi-"cab. I do not think it was given in evidence, but I suppose "5 ft. is a reasonable amount to assume as the width of the "taxi-cab. In the same way, the view which the omnibus "driver would have of her when she was on the pedestrian "crossing would also be masked by 5 ft." The learned judge accepted the evidence of the driver that he was going 15 miles an hour and held that that was a perfectly reasonable pace, found that the lights were in his favour, that he first saw the first respondent after she emerged from behind the taxi at about the middle of his part of the crossing and at about a distance of 9 feet, that he braked hard and eased off to the left a little but could not turn far, because to have done so would have been to hit the refuge in the centre of the crossing, and that he had his omnibus under perfect control. The driver also said, and Humphreys J. accepted his evidence, that the first respondent did not look as if she saw him, that he doubted if an accident could have been avoided even if she had been looking, and, in reply to a question put in cross-examination, that he knew "people in London have a habit of crossing a road "when the lights are not in their favour" and (according to the learned judge's note) that "they will do it and it is a thing "you look out for." From the evidence of the conductor, who was a third of the way down the inside of the bus and saw the first respondent hurrying across the pavement before she was hidden by the taxi-cab, and of a lady passenger in the front left-hand seat inside, who spoke to seeing the first respondent hesitating on the pavement and then plunging across the street, the learned judge concluded that the first respondent's movements across the pavement before she reached the taxi-cab should have been observed by the driver. In these circumstances, Humphreys J. did not think it necessary to come to a definite conclusion as to the result of the regulations, but found both the first respondent and the driver guilty of negligence at common law, the first respondent because she failed to take the precaution of looking to see whether the lights were green or red and the driver because (1) " he knew that, although " the lights were in his favour, people might cross, and that " he knew . . . . he was not entitled to run them down " on a pedestrian crossing . . . . on the ground that the " pedestrian was negligent." Therefore the bus driver ought to have been on the look out to see whether there was anybody approaching the taxi-cab who was apparently about to pass in front of it and might be expected to appear on the crossing just about the time the driver got there. The learned judge observed that he did not see her, while two witnesses for the appellants said they did see her and she was perfectly plain to be seen hurrying towards the kerb obviously with the intention of crossing. He said (1): " I think that the driver plainly " exhibited negative negligence not foreseeing danger to a " pedestrian who was lawfully in the road on that crossing."

Humphreys J. assessed the damages at 500*l.* and apportioned the blame equally between the driver and the first respondent, holding that both were guilty of negligence at common law. He accordingly reduced the award to 250*l.* The Court of Appeal held that reg. 3 of the Pedestrian Crossing Places (Traffic) Regulations, 1941, applied and that the driver, though not guilty of negligence, was in breach of it. The appellants appealed to the House of Lords.

Fox-Andrews K.C. and *Armstrong-Jones* for the appellants. There is no evidence that the driver was guilty of any breach of his common law duty of care. As for the Pedestrian Crossing Places (Traffic) Regulations, 1941, it is not contended that because they were not pleaded they cannot be relied on by the respondents but the driver was not guilty of any breach of reg. 3, because the omnibus had ceased to be an " approaching " vehicle at the moment when the first respondent stepped on to the crossing. Further, he was under no duty to allow her "free and uninterrupted passage" on the crossing under reg. 5, and, on the proper interpretation of reg. 3, it was not "necessary" for him to be able to stop before reaching the crossing. The measure of this necessity must depend on all the circumstances of the case and not simply on the presence or absence of a pedestrian on the crossing. The regulations must be construed as a whole and the proper construction of reg. 3 requires that one should also have regard to regs. 4 and 5 which indicate that reg. 3 does not apply to crossings controlled by the police or by traffic signals. In any event, the accident was not due to any fault at common law or under the regulations on the part of the driver, even assuming that there was a technical breach of statutory duty. In this class of case each one must depend on its own facts and it is a matter of degree. Here there was no duty on the driver to see the first respondent; that duty is the test. So far as common law duty goes, if a submission had been made to the trial judge that there was no case for a jury it should have been upheld. In this case the driver had the lights in his favour. He was entitled to have in mind the high probability that pedestrians would obey the lights and the degree of vigilance required of him must be qualified accordingly. He was not required to be so much on his guard against a pedestrian stepping off the pavement as he would otherwise have been. When a driver is approaching a crossing controlled by a police officer or by lights and he is being invited or permitted by either form of control to proceed, then in those circumstances less vigilance is required of him in the matter of the look-out which he is obliged to keep than would otherwise be the case. A police officer signalling traffic on is performing the same function as the green light: see Traffic Signs (Size, Colour and Type) Provisional Regulations, 1933, reg. 28 (iii.). If a driver saw a police officer telling a pedestrian not to cross he would not be obliged to assume that the pedestrian would cross and that is substantially the position here. If, for example, every driver of every vehicle in Oxford Street had to behave as though he had not got the green light in his favour the traffic could not move at all. The critical words in reg. 3 are "approaching" and "at such a speed as to be able if "necessary to stop." The regulation prescribes a code of conduct for the drivers of the vehicles within it. The meaning of the word "approaching" may vary in different circum-

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(1) (1947) 176 L. T. 356, 358.

H. L. (E.)

1948

London Passenger Transport Board v. Upson.

stances. If, in a given case, it was found that a vehicle that had got within ten yards of a crossing had ceased to be an "approaching" vehicle, thereafter the obligations under reg. 3 would cease to operate. At some point a vehicle must cease to be an "approaching" vehicle; the point must be that at which, if going at a reasonable speed, it could stop before reaching the crossing. Otherwise it would have to slow down at every crossing till it stopped at the studs. A vehicle "at" a crossing is one which, for all practical purposes, has arrived on it. This regulation must be read in the light of regs. 4 to 7, especially of reg. 5 with its negative implications overriding reg. 3; there is nothing in reg. 3 to protect a foot passenger who goes onto a crossing after a driver has received a signal that he may proceed. In the present circumstances the omnibus had ceased to be an "approaching" vehicle at the moment when, but for the presence of the taxi-cab, the driver would have seen the first respondent step off the pavement. It is to be remembered that his speed was found to be reasonable. On the particular facts of this case there was no failure to comply with reg. 3. When the omnibus was "approaching" there was no foot passenger on the crossing and when there was a foot passenger on the crossing the omnibus had ceased to be an "approaching" vehicle. If "approaching" in reg. 3 were read in a literal sense a point would come at which every vehicle would have to slow down to a walking pace. The opinion expressed by du Parcq L.J. in *Chisholm* v. *London Passenger Transport Board* (1) substantially expresses the duty of a driver. [They also referred to *Bailey* v. *Geddes* (2), *Knight* v. *Sampson* (3), *McLean* v. *Bell* (4) and *Sparks* v. *Edward Ash, Ld.* (5).]

Lord Porter intimated that their Lordships required counsel for the respondents to state rather than to argue their propositions.

Vick K.C., *Isaac Reuben* and *Aarvold* for the respondents. There was evidence of negligence at common law on the part of the driver. In any event there was a breach by him of reg. 3. As to the former point, there was a clear case of negligence, since the driver never altered his speed or sounded his horn when making to pass a stationary vehicle on his near side. As to reg. 3, once the driver could have said to himself that there was no foot passenger on the crossing he would have been in the right but he could not say that because the taxi-cab obscured his vision. He should have anticipated that some person, whom by reason of the taxi-cab's presence he could not see, might negligently attempt to pass over the crossing and he should have driven slowly enough to be able to pull up before reaching it, should that occur. The obligations under reg. 3 are superimposed on those of the common law.

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(1) [1939] 1 K. B. 426, 449.

(2) [1938] 1 K. B. 156.

(3) (1938) 159 L. T. 257.

(4) (1932) 147 L. T. 262.

(5) [1943] K. B. 223.

THE HOUSE took time for consideration.

Dec. 9. LORD PORTER. My Lords, this appeal raises certain questions as to what constitutes negligence at common law in the case of the driver of an omnibus in approaching and passing over a pedestrian crossing and a further question as to the construction of and obligations imposed by the Pedestrian Crossing Places (Traffic) Regulations, 1941.

My Lords, as it seems to me, the facts as found by the learned judge and those upon which the case was argued before your Lordships were not quite the same. Before your Lordships the respondents' representatives, as I understood them, laid little emphasis on the suggestion that the lady should have been seen by the driver hurrying across the pavement before she reached the taxi-cab. What they did say was that the driver should have anticipated that some person who, owing to the presence of the taxi-cab could not be seen, might negligently try to pass over the crossing, and should have driven slowly enough to enable him to pull up before reaching the crossing in case such an eventuality occurred. In the Court of Appeal, however, reliance appears to have been placed upon the facts as found by the learned judge and dealt with by the Master of the Rolls when he said (1): " The fact that if the driver had " looked in that direction he would have seen the plaintiff is " no ground for saying that it was his duty to look in that " direction. The fact that a driver could have seen something " if he had looked is, of course, conclusive against him when he " was under a duty to look; to say that he was under a duty " to look because if he had looked he would have seen is, with " respect, entirely to misunderstand the nature and foundation " of the duty to keep a proper look-out."

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(1) [1947] K. B. 930, 938.

My Lords, if the driver could and ought to have seen the plaintiff hurrying towards the crossing before she reached the taxi-cab and to have anticipated that she was about to or might hasten across the crossing and did not do so, undoubtedly he would be guilty of negligence at common law. With all respect to the learned judge, however, I cannot think that the evidence justified such a finding. It is true that the conductor with a free mind and an eye unconcentrated on the highway did see her at that moment, but the other independent witness spoke rather to her hovering on the kerb, undecided whether to cross or not. In any case there is no evidence as to the number of pedestrians on the side-walk and the conductor was at least 14 feet behind the driver and may well have seen what was invisible to him owing to the obstruction of the taxi-cab. I think the driver must be acquitted of any negligence in failing to see the first respondent before she disappeared from view behind the taxi-cab. Was he then negligent in not anticipating that some unseen person would suddenly emerge in front of the taxi-cab in spite of the fact that the lights were in favour of the bus? I cannot take such a view. It is true that the taxi-cab obstructed some 5 feet of the crossing and that it and a refuge in the middle of the road hampered the driver's freedom of movement, but he had a signal in his favour, was going at a moderate speed and to my mind should no more be expected to anticipate that anyone would cross against the lights than that someone would suddenly emerge from behind a vehicle drawn up at the side of the road at a place where there was no pedestrian crossing. In neither case do I think that it matters that the manœuvring space had been narrowed by a taxi-cab on one side and a refuge on the other. In my view a foot passenger at a pedestrian crossing with the lights against her is at least in no better position than such a person crossing the road at any uncontrolled spot. A driver must, of course, keep a proper look-out even for negligent pedestrians but short of proceeding at a walking pace—and even that may not be enough—it is hardly possible to be certain of avoiding accidents where the injured party is guilty of gross negligence. Moreover, it must be remembered (i.) that foot passengers too have a duty to perform and in particular that by s. 45, sub-s. 4, of the Road Traffic Act, 1930: "A failure on the part of any person to "observe any provision of the highway code . . . . may in "any proceedings . . . . be relied upon by any party to the "proceedings as tending to . . . . negative any liability which "is in question in those proceedings"; (ii.) that para. 98 of the code of 1935, in force at the material time, reads: "At "controlled crossings, i.e., wherever traffic is controlled "by police or signals, cross the road only when the appropriate "line of traffic is held up"; and (iii.) that the driver was entitled to place some reliance upon these provisions. Speaking for myself, I can find no step taken by the driver which constitutes a negligent act.

There remains, however, the effect of the regulations. They are ill-drafted and ill-considered but, such as they are, effect must be given to them. The relevant regulations are numbered 3, 4 and 5 and are in the following terms: "3. The driver of "every vehicle approaching a crossing shall, unless he can "see that there is no foot passenger thereon, proceed at such "a speed as to be able if necessary to stop before reaching such "crossing. 4. The driver of every vehicle at or approaching "a crossing where traffic is not for the time being controlled "by a police constable or by light signals shall allow free and "uninterrupted passage to any foot passenger who is on the "carriageway at such crossing, and every such foot passenger "shall have precedence over all vehicular traffic at such "crossing. 5. The driver of every vehicle at or approaching "a crossing at a road intersection where traffic is for the "time being controlled by a police constable or by light signals "shall allow free and uninterrupted passage to every foot "passenger who has started to go over the crossing before the "driver receives a signal that he may proceed over the "crossing." Of these regulations, reg. 3 states the general duty of a driver when approaching a crossing, regs. 4 and 5 state the duty which he owes to foot passengers when he is at or approaching a crossing and they have stepped off the pavement. In considering its application to this case, reg. 5 is perhaps most material in its negative implications, i.e., it enacts that uninterrupted passage is to be allowed to everyone who has started to go over the crossing before the light turns green, and inferentially declares that such passage need not be given once the light has turned green. But I do not think that reg. 5 overrides reg. 3 even at a controlled crossing and reg. 4 is not applicable to the present case. What then is the true effect of reg. 3? If it is to be taken in its most literal sense vehicles would have to come to a dead stop at every pedestrian crossing, inasmuch as however slowly they were going someone might step in front of them at the last moment and so be injured. Such a construction would make nonsense of the regulation and therefore it is necessary to consider whether so strict an interpretation must be put upon it.

Two questions arise as to the interpretation of the wording and were argued before your Lordships, viz. : (1.) What is an approaching vehicle, and (2.) what is to be regarded as the moment at which the driver must be able to see that there is no foot passenger upon the crossing ? A vehicle, the appellants contended, must cease to be an approaching vehicle at some point and that point must be that at which, if going at a reasonable speed, the driver could stop before reaching the crossing. If this were not so, he must decrease his speed at every crossing until he has reached a state of immobility when he arrives at the studs. My Lords, if this result necessarily followed I should hesitate unless compelled to reject the contention, but the wording is against such a construction. The word " approaching " is used in regs. 4 and 5 as well as in reg. 3, and in the two former occasions in conjunction with the word " at." In the first place it is unlikely that " approaching " should be used in two separate senses in the three successive regulations and in the second I find it difficult to accept the view that there are three states in the progress of a vehicle—" approaching," " at " and some intermediate and indeterminate stage when it is neither at nor approaching the crossing. The safeguard to the driver, in my view, does not come from a narrowed construction of the word " approaching " but from a correct appreciation of the meaning of the phrase " unless he can see that there is no foot passenger thereon." When must he so see ? Not, I think, up till the very moment he reaches the studs. If so late a time were taken he would again be under the disability of having to slow down to a stop on each occasion that he intended to pass over a crossing. The regulations do not specify the distance between him and the crossing at which his ability to see must be tested, and therefore I think it must be at a reasonable distance. Lord du Parcq, then du Parcq L.J., adverted to this approach to the matter in his dissenting judgment in *Chisholm* v. *London Passenger Transport Board* (1), when he said : " It is, I think, a reasonable " view that if a motorist, keeping a good look-out and going " at such a speed that he can pull up in a few feet, sees a foot " passenger come upon the crossing so late that it is impossible

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(1) [1939] 1 K. B. 426, 449.

"for the car to stop before reaching the crossing, the motorist "will not be guilty of a breach of the regulations. It might "fairly be said on his behalf that he 'could see that there was "'no foot passenger on the crossing' down to the last moment "when he could reasonably expect a foot passenger to be there, "and that he did all that in him lay to 'allow free and "'uninterrupted passage to any foot passenger who was on "'carriageway at such crossing'." Earlier the learned Lord Justice said (1): "The words 'approaching a crossing' "in reg. 3 in my view refer not to a point 100 or 50 yards "from the crossing, but to a space which begins, say, "15 or 20 feet from the crossing." My Lords, I have quoted from this judgment because I find myself in general agreement with the principle that the moment at which the motorist must be able to see whether the crossing is clear or not does not continue until the crossing itself is reached, but, with profound respect, I am unable to accept the suggestion that the distance up to which the crossing must be observed to be empty persists up to a few feet or for that matter 15 or 20 feet. I think the true position is that the motorist must be able to see whether the crossing is clear or not up to the time when, going at the speed he is going, provided it is a reasonable speed, he would still be able to stop before reaching the crossing. This view appears to me to be in accordance with that held by Scott and MacKinnon L.JJ., as expressed in *Chisholm's* case (2) and, if I may adopt MacKinnon L.J.'s method of exposition (3), if a motorist proceeding at x miles per hour, whatever that speed may be, provided it is a reasonable speed, can stop in y yards, he must see that the crossing is clear until he has approached to a spot within that distance. If he does not or cannot do so he has committed an offence against the regulations. But he has not broken them if someone steps on the crossing after he has reached such a spot. This construction of the statute does, I think, make it workable, and is not inconsistent with the other two cases *Bailey* v. *Geddes* (4) and *Knight* v. *Samson* (5), which deal with the effect of the regulations.

Applying that principle to the present case, it leaves the driver of the bus guilty of a breach of the regulations because, in my opinion, had he had a clear view of the crossing uninterrupted by the presence of the taxi-cab he could, going at the speed he was going, have pulled up in time. In other words before he had reached the spot at which it was no longer incumbent on him to see that the crossing was clear his vision was hindered by the taxi-cab, and his inability to see whether there was or was not anyone on the crossing at that moment was in my view, the cause of the accident. As it was, though he could not see the lady until after she emerged from in front of the taxi-cab, he almost managed to stop before reaching the crossing and so to avoid the accident. Had he had the second or so more time which would have been afforded him by seeing her step on to the crossing he would have been able to avoid it.

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(1) [1939] 1 K. B. 426, 449.
(2) Ibid. 438.
(3) Ibid. 442.
(4) [1938] 1 K. B. 156.
(5) 159 L. T. 257.

I would dismiss the appeal.

LORD WRIGHT. My Lords, Humphreys J. held that the appellants' driver was to blame for not being on the look-out to see whether there was anybody who might come out in front of the taxi-cab after passing it. The judge did not think it necessary to discuss the regulations. He also held that the first respondent was guilty of contributory negligence for not looking at the lights which controlled the traffic before she emerged past the cab. He assessed the damages at 500*l*. and apportioned the blame equally between the two parties. In the Court of Appeal, the Master of the Rolls was for holding that the first respondent was solely to blame: he was also prepared to hold that the appellants' driver was not in fault either for common law negligence or for breach of the regulations, which I shall discuss later; but the majority of the court, while agreeing with the judge that the first respondent was guilty of contributory negligence, which indeed was not contested before this House, held the appellants liable for breach of the regulations.

Before your Lordships this latter was the issue primarily argued. Some confusion was introduced throughout because reg. 3 was not expressly pleaded, but the majority of the Court of Appeal held that as the substance of the matter was set out, the issue was open, and the majority of the Court of Appeal were prepared to decide the case upon it. I read their decision as being based on the breach of the reg. 3, as a separate and independent cause of action, subject however to reduction of the damages to such extent as the court thinks just and equitable, having regard to the first respondent's share in the responsibility for the damage. Such is now the effect of s. 1 of the Law Reform (Contributory Negligence) Act, 1945, which takes the place of the previous rule of the common law that a person's claim would be defeated if the damage were partly due to his own fault and partly to the fault of the defendant. It was under the old rule that previous cases of this character were decided, as for instance the latest of the series cited, *Sparks* v. *Edward Ash, Ld.* (1). It had been recognized in that and the earlier decisions that contributory negligence of the plaintiff might be a material issue on which a defendant might rely by way of defence in cases of breach of the traffic regulations. But whereas in *Sparks'* case (1), it was, if established, a defence in toto, under the Act of 1945, it is now a defence pro tanto. The Act introduced into the common law the rule long ago adopted in the Admiralty Court where there is a finding of " both to blame." In such Admiralty cases this House has said that where the findings of fact in the court below are not reversed in the appellate courts and the decision that both vessels are to blame stands, the cases in which an appellate tribunal will undertake to revise the distribution of blame will be rare. So it was stated by Viscount Simon L.C. in *British Fame* (*Owners*) v. *Macgregor* (*Owners*) (2). I apprehend that your Lordships will think that the same rule or practice which has thus been adopted for sea collisions will be applied in the case of land collisions. The trial judge is in a much better position to decide such questions of distribution than an appellate court save in exceptional cases. I think this course should be adopted in the present case. It is true that there is a distinction where the respondent's contributory negligence falls within the class of ordinary common law negligence, and where the appellant's responsibility can be based on the breach of a statutory obligation; but both would fall within the language of s. 1 of the Act of 1945; each has reference to the same type of damage, and each party shares in the responsibility for the damage because, in the words of the section, the damage is the result partly of the plaintiff's own fault and partly of the other's fault. The words of the section are thus equally appropriate to the common law liability and to the statutory responsibility. In *Sparks'* case (3) Goddard L.J. (as he then was) sitting in the Court of Appeal observed that, in view of what was held in *Caswell* v. *Powell Duffryn Associated Collieries, Ld.* (4), in

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(1) [1943] K. B. 223.

(2) [1943] A. C. 197, 199.

(3) [1943] K. B. 223, 239–40.

(4) [1940] A. C. 152.

H. L. (E.)

1948

London Passenger Transport Board v. Upson.

Lord Wright.

regard to breaches of a statutory duty, he could not see the difference between one statute and another, and compared the provisions of the Factory Acts, the Coal Mines Act and others, with the regulations here in question. He described the action in *Caswell's* case (1) as a common law action based on the statute intended to protect the workman, and similarly, he said, an action based on the regulations was based on a statutory regulation intended to protect the pedestrian and (adopting the old expression) was equally an action on the case, in which damage was the gist of the action; he went on to say that the question for the court was whether the damage was caused by the defendant's breach of the statutory regulations. Now since the Act of 1945 he would say "was "caused in whole or in part."

I think the authorities such as *Caswell's* case (1), *Lewis* v. *Denye* (2) and *Sparks'* case (3) show clearly that a claim for damages for breach of a statutory duty intended to protect a person in the position of the particular plaintiff is a specific common law right which is not to be confused in essence with a claim for negligence. The statutory right has its origin in the statute, but the particular remedy of an action for damages is given by the common law in order to make effective, for the benefit of the injured plaintiff, his right to the performance by the defendant of the defendant's statutory duty. It is an effective sanction. It is not a claim in negligence in the strict or ordinary sense; as I said in *Caswell's* case (4): "I do not "think that an action for breach of a statutory duty such as "that in question is completely or accurately described as an "action in negligence. It is a common law action based on "the purpose of the statute to protect the workman, and "belongs to the category often described as that of cases of "strict or absolute liability. At the same time it resembles "actions in negligence in that the claim is based on a breach "of a duty to take care for the safety of the workman." But, whatever the resemblances, it is essential to keep in mind the fundamental differences of the two classes of claim. Here I should perhaps be guilty of hyper-criticism if I were to quarrel with Asquith L.J.'s expression (5) that the common law duty is enhanced by the duty contained in the regulations. One duty does not in truth enhance the other, though the same damage may be caused by action which might equally be characterized as ordinary negligence at common law or as breach of the statutory duty. On the other hand the damage may be due either to negligence or to breach of the statutory duty. In the present case Asquith L.J. decided, as I understand, in favour of the respondents, not on the ground of negligence, which he did not find, but specifically on the ground of breach of statutory duty. There is, I think, a logical distinction which accords with what I regard as the correct view that the causes of action are different. It follows that the correct pleading would be to allege each cause of action separately so as to avoid the confusion which seems to me to have crept in at certain points of these proceedings. I have desired before I deal specifically with the regulations to make it clear how in my judgment they should be approached, and also to make it clear that a claim for their breach may stand or fall independently of a claim for negligence. There is always a danger if the claim is not sufficiently specific that the due consideration of the claim for breach of statutory duty may be prejudiced if it is confused with the claim in negligence.

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(1) [1940] A. C. 152.

(2) [1940] A. C. 921.

(3) [1943] K. B. 223.

(4) [1940] A. C. 152, 177.

(5) [1947] K. B. 930, 945.

The regulations in question may now be considered. Of these reg. 3 is most directly relevant. It is in the following terms: "The driver of every vehicle approaching a crossing shall, "unless he can see that there is no foot passenger thereon, "proceed at such a speed as to be able if necessary to stop "before reaching such crossing." Regulation 3 clearly deals with either controlled or uncontrolled crossings. Then comes reg. 4, which reads as follows: "The driver of every "vehicle at or approaching a crossing where traffic is not for "the time being controlled by a police constable or by light "signals shall allow free and uninterrupted passage to any foot "passenger who is on the carriageway at such crossing, and "every such foot passenger shall have precedence over all "vehicular traffic at such crossing." Regulation 5 deals with a controlled crossing, and is in these terms: "The driver of "every vehicle at or approaching a crossing at a road inter-"section where traffic is for the time being controlled by a "police constable or by light signals shall allow free and "uninterrupted passage to every foot passenger who has "started to go over the crossing before the driver receives a "signal that he may proceed over the crossing." Regulation 6 contains a general prohibition of a vehicle stopping on the crossing and reg. 7 forbids a foot passenger from delaying on the crossing.

The respondents' principal case is that there was a breach by the appellants' driver of reg. 3. It has been found that the driver did not proceed on "approaching" the crossing so as to be able to stop before reaching the crossing. The taxi-cab unlawfully drawn up on the crossing prevented the driver from seeing that there was no foot passenger on it. Hence he was bound to proceed at a pace which would enable him, if necessary, to stop before reaching the crossing. The driver was indeed proceeding at a reasonable rate apart from the regulation, but he was in fact unable to stop before reaching the crossing and in consequence he hit and injured the first respondent. She was indeed herself negligent in coming out beyond the taxi-cab without sufficiently considering the green light and the approaching traffic. She made a miscalculation—it is true it was comparatively venial, because she got across to within two feet of the refuge before she was struck. That was her contributory negligence. But the driver's failure to obey reg. 3 caused, or contributed to, the accident. It was not adeemed by the miscalculation on the part of the first respondent; that only goes here to reduce the amount of her recovery, under s. 1 of the Act of 1945. The driver's breach of the statutory duty was sufficient to impose liability pro tanto. The only word in the regulation which has made me pause is the word "approaching." The word connotes some, but an indefinite degree of, proximity. It must be reasonably applied because it may, perhaps, must, involve interference with the flow of traffic, which can only be justified so far as necessary to promote the purpose of saving the lives and limbs of the public. Regulation 4 obviously distinguishes between "at" and "approaching," as does reg. 5 also. These regulations deal separately with uncontrolled and controlled crossings, whereas reg. 3 deals with both types without qualification. But they are important to some extent in considering reg. 3. They give a terminus ad quem for the word "approaching." But the point of time or place at which the duty to regulate the speed attaches is not defined. That, I think, must be left to the judgment of the court, which has to decide what a reasonable driver would do in the particular facts of the case, so far as the regulation is not specific. I find valuable guidance in some observations made by my noble and learned friend Lord du Parcq, then Lord Justice, sitting in the

H. L. (E.)

1948

LONDON PASSENGER TRANSPORT BOARD *v.* UPSON.

Lord Wright.

Court of Appeal in *Chisholm* v. *London Passenger Transport Board* (1), in the course of a powerful dissenting judgment with the reasoning of which I substantially agree. He said: "The words 'approaching a crossing' in reg. 3 in my view "refer not to a point 100 or 50 yards from the crossing, "but to the space which begins, say, 15 or 20 feet from the "crossing. It is when a driver enters on that final piece of "roadway that, unless he can see that there is no foot "passenger on the crossing, he must be prepared to proceed "at a speed which will enable him to stop before reaching the "crossing . . . . But any construction of reg. 3 which was "more generous to the motorist, even if the words of the "regulation could bear it, as in my view they cannot, would "encourage him to ignore reg. 4 which contains the important "words 'at or approaching a crossing' and gives precedence "at the crossing not to the motorist but to the foot passenger." If the driver, whether "at or approaching" the crossing, sees any foot passenger upon it, he must give him precedence. If he cannot see any foot passenger when approaching he must moderate his speed as required by the regulations. If he has complied with the reg. 3 in the particular contingency which it contemplates, he is void of offence under reg. 3. It may be that cases within reg. 3 are comparatively rare. But where there are such cases reg. 3 is imperative and mandatory, though it still leaves open the issue of the contributory negligence of the foot passenger. He is not given a licence to neglect any reasonable precaution for his own safety, though the law does not forbid him to traverse a crossing with the light against him if he can do so safely. That may also be an important question on the issue whether the breach of reg. 3 can be treated in any particular case as in whole or in part causing the accident. It is only if that is found that the plaintiff's action for damages can succeed. He must show (1.) breach of the regulation, (2.) damage caused by it. I agree with the reasoning of Cohen L.J. for his decision that the driver acted in breach of reg. 3 and that such breach was a contributory cause of the accident. I think also that Cohen L.J. dealt sufficiently and satisfactorily with the decisions cited to your Lordships, and I do not feel obliged to deal further with them in detail. I share the regrets of Asquith L.J. arising from the insufficiency of the pleading. He felt, however, entitled, having regard to the course of the proceedings, to treat the pleading as having been amended. I ought to add that I agree with Lord du Parcq in criticizing the passages which he quotes in the opinion he is about to deliver from the judgment of the Master of the Rolls in the present case. I agree that the appeal should be dismissed.

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(1) [1939] 1 K. B. 426, 448.

Lord Uthwatt. My Lords, at the hearing of the appeal the appellants' counsel stated his willingness that the case should be dealt with as if the pleadings had specifically alleged that the driver of the omnibus had broken reg. 3 of the Pedestrian Crossing Places (Traffic) Regulations, 1941, and had thereby injured the female respondent. On that basis the appeal must, in my opinion, fail.

First it is clear that the duty arising under reg. 3 was imposed with a view to protecting persons on the crossings therein referred to from the peril of approaching vehicles. The female respondent can rest her claim therefore merely on a breach of that duty directly causing damage to her when on the crossing. It is not necessary for her to prove negligence on the part of the driver or an aggressive act directed against her. Next the female respondent was on such a crossing as is referred to in reg. 3, for it is idle to suggest that a crossing controlled by lights ceases to be a crossing within the meaning of reg. 3 when the lights show green to on-coming traffic. Lastly at no point of time could the driver see that there was no foot passenger on the crossing and at all times (until the female respondent emerged to his view when he was some 9 feet from the crossing) he kept his speed of 15 miles an hour. I cannot see how on any construction of the phrase " vehicle approaching a crossing " the driver can be acquitted of a breach of the regulation directly causing the injury suffered by the female respondent.

The question of the proper construction of reg. 3 was, however, debated before your Lordships and upon that question I desire to express my general agreement with the observations of my noble and learned friend Lord du Parcq in *Chisholm* v. *London Passenger Transport Board* (1), I differ only from him—I doubt whether there is between us more than a difference of expression—in that I think that the speed of the vehicle as well as its distance from the crossing should be taken into account in determining the point at which the vehicle begins to be an approaching vehicle. I would prefer to fix that point at the place at which on a common-sense view the crossing first

(1) [1939] 1 K. B. 426.

emerges as a possible obstacle to further safe progress by that vehicle if it continued to proceed at its then speed. If the driver at any time after the vehicle has become an approaching vehicle is unable to see that there is no foot passenger on the crossing, he has, subject only to the application of the principle "Lex non cogit ad impossibilia," broken the regulation if the speed of his vehicle is not at that time such as to enable him if necessary to stop before reaching the crossing. The necessity of complying with the regulation is a matter which at all points of time the driver must bear in mind. The difficulties attending compliance with the regulation are, I think, easily exaggerated for drivers can keep a look-out to the sides of the road as well as to the front. Undoubtedly, however, cases might well occur where consistently with reading the regulation as directed to regulating the movement of traffic and not to stopping traffic (and I think it ought to be so read) it is impossible in any rational sense to comply with it. In such cases the principle as to impossibility, the limits of which will be found stated in *The Generous* (1), takes the matter outside the purview of the regulation.

In the view that I have formed it is not necessary for me to deal with the question of negligence. I desire only to register my dissent from the view expressed by the Master of the Rolls (2) that drivers "are entitled to drive on the assumption "that other users of the road, whether drivers or pedestrians, "will behave with reasonable care." It is common experience that many do not. A driver is not, of course, bound to anticipate folly in all its forms, but he is not, in my opinion, entitled to put out of consideration the teachings of experience as to the form those follies commonly take.

I would dismiss the appeal.

LORD DU PARCQ. My Lords, the learned counsel for the appellant Board invited your Lordships to deal with this appeal on the footing that, notwithstanding the omission of any reference to the material statutory regulations in the statement of claim, the respondents were entitled to rely on any breach of them which the evidence established. Even without this invitation it would, I think, have been difficult for your Lordships to dispose of the appeal without regard to these regulations. To attempt to do so would be to shut one's eyes to considerations which are both relevant and important.

(1) (1868) L. R. 2 A. & E. 57.

(2) [1947] K. B. 930, 938.

I hope that I shall not be thought to be lacking in respect for the forcibly expressed dissenting judgment of the learned Master of the Rolls when I say that it seems to me to be beyond doubt that the driver of the appellants' omnibus was guilty of a breach of reg. 3 of the Pedestrian Crossing Places (Traffic) Regulations, 1941. I agree with the majority in the Court of Appeal that there is no justification for the suggestion that a crossing controlled by lights ceases to be " a crossing " within reg. 3 while a green light is being shown to on-coming traffic. There is nothing in the context to make possible a construction which does such violence to the language of regs. 2 and 3, and I should not feel justified in refusing to give the words their ordinary meaning even if it seemed difficult to suppose that the Minister could have intended them to bear it. I find no such difficulty here. It must be agreed, I think, that one object of these regulations is to save foot passengers from injury, and since foot passengers are not prohibited from using a " pedestrian crossing place " controlled by lights even when a green light is being shown to on-coming traffic, though it is sometimes negligent and often perilous for them to do so, it does not seem to me to be surprising that the Minister should think that the lives and limbs even of persons who may have been careless should to some extent be protected. When once it is granted that the respondent, Mrs. Upson, was on " a crossing " (within the meaning of reg. 3) when she was knocked down by the appellants' omnibus, consequences follow which I find so clearly stated by Cohen L.J. that I will borrow his language. " On the evidence," the Lord Justice said (1), " it is plain that at all material times the presence of the " stationary taxi prevented the driver having an uninterrupted " view of the whole of the crossing. That being so, it was " impossible for him to see that there was no foot passenger " thereon and it was therefore his duty under the regulation to " proceed at such a speed as to be able, if necessary, to stop " before reaching the crossing. On the driver's own evidence " he saw the plaintiff when she was 9 feet away from the " omnibus and when he stopped the front wheels of the bus " were on the crossing. Had he been driving at such a pace " as to enable him to stop short of the crossing, it must, in my " opinion, follow that he could have stopped within those " 9 feet." This brief statement to my mind disposes of the appellant's case. It is right, however, in deference to the

(1) [1947] K. B. 930, 942.

opinion of the Master of the Rolls, that I should state my reasons for respectfully differing from him.

My Lords, the learned Master of the Rolls has stated with great clarity a view of the law of negligence which, in my opinion, ought not to receive the approval of your Lordships' House. "The driver of the omnibus," the Master of the Rolls said (1), "was entitled to assume that the plaintiff, like "other pedestrians, would conform to common sense and "ordinary care in the presence of an adverse signal, particularly "in view of the provisions of the Highway Code." The Master of the Rolls then quoted the instruction to pedestrians in the Highway Code by which they are advised "at controlled "crossings . . . ." to "cross the road only when the appro-"priate line of traffic is held up." Dealing with the admitted fact that the appellants' driver was well aware that foot passengers do frequently use a crossing when the lights are in favour of the vehicular traffic on the road, he said (2): "The "fact that a driver knows that other people on occasions do "things that no careful driver would be expected to anticipate "does not mean that he is under a duty to anticipate such "action." It follows from these premises that the appellants' driver was (3) "entitled to drive on the assumption that no "pedestrian would disobey the light signal." The presence of the taxi-cab which obscured his view made no difference. There was no evidence of negligence. Therefore, as the alleged breach of regulation was (3) "relied on as evidence of negligence "and nothing more," the case against the appellant failed. My Lords, if the premises are granted this reasoning is impeccable, but I do not accept the premises as sound. It is assumed in them that a pedestrian is "disobeying" an "adverse" signal if he crosses a light-controlled "pedestrian "crossing" at a time when the green light is signalling to vehicular traffic permission to advance, whereas in truth the pedestrian is under no legal compulsion to keep off the crossing at such a time, and the signal is never "adverse" to him in the sense that it prohibits him from crossing. The most that can be said is that he often takes a risk, which may be such that it is negligent to take it, if he crosses when the traffic is not being held up. If he crosses while the traffic is being permitted to proceed, he deprives himself, to some extent, of the special protection which the "pedestrian crossing" is designed to give

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(1) [1947] K. B. 930, 935.

(2) Ibid. 937–8.

(3) Ibid. 939.

H. L. (E.)

1948

LONDON PASSENGER TRANSPORT BOARD *v.* UPSON.

Lord du Parcq.

to pedestrians. He does not, however, lose the protection which reg. 3 affords. Apart from this assumption, the propositions advanced by the learned Master of the Rolls do not, I think, accord with the law as it has been laid down in your Lordships' House. The correct principle was stated by Lord Dunedin when he said: " If the possibility of the " danger emerging is reasonably apparent, then to take no " precautions is negligence; but if the possibility of danger " emerging is only a mere possibility which would never " occur to the mind of a reasonable man, then there is no " negligence in not having taken extraordinary precautions." (*Fardon* v. *Harcourt-Rivington* (1).) I regard this statement and that of Lord Macmillan in the same case, which was to the like effect, as applying generally to actions in which the negligence alleged is an omission to take due care for the safety of others. It must follow that (if I may repeat what I said in the recent case of *Grant* v. *Sun Shipping Co., Ld.* (2), in this House), " a prudent man will guard against the possible " negligence of others when experience shows such negligence " to be common." The driver of the appellants' omnibus agreed in cross-examination that he knew " that people in " London have a habit of crossing a road when the lights " are not in their favour." Even apart from the duty imposed on him by the regulations, he was therefore bound to take precautions against the possibility that some person was concealed from his view by the stationary cab and might suddenly emerge from its protection. On this ground alone it must at least be said that there was evidence to support the conclusion that the driver had failed to take reasonable care for the safety of others and was therefore negligent. A driver is never entitled to assume that people will not do what his experience and common sense teach him that they are in fact likely to do. It is true that in some circumstances it is not reasonably possible for a driver to do anything to save a pedestrian from the consequences of the pedestrian's own act, just as the pedestrian can sometimes truly say that, although he knows that drivers are sometimes negligent, he could not reasonably have been expected to avoid the particular act of negligence which has caused him injury. These are questions for a jury, but I must say, with all respect, that a direction to a jury in the terms of the propositions enunciated by the learned Master of the Rolls would be, in my opinion, unduly favourable to a defendant driver.

(1) (1932) 146 L. T. 391, 392.

(2) [1948] A. C. 549, 567.

H. L. (E.)

1948

LONDON PASSENGER TRANSPORT BOARD *v.* UPSON.

Lord du Parcq.

Another reason given by the learned Master of the Rolls for his opinion that the decision of Humphreys J. should be reversed was that the omnibus had ceased to be an "approaching" vehicle within the meaning of reg. 3 at the moment when the respondent, Mrs. Upson, stepped on the crossing. He said (1), relying on certain observations made in the Court of Appeal in *Chisholm* v. *London Passenger Transport Board* (2), that if there had been no taxi-cab on the crossing the omnibus would not at that moment have been an "approaching" vehicle, and argued that it could not be said to be an "approaching" vehicle merely because there was a taxi-cab there which obscured the bus driver's view. My Lords, it is never very satisfactory to consider a case on the hypothesis that its facts were other than we know them to have been. The words "unless he can see that there is no foot passenger thereon" are important words. When the reason why a driver cannot see that there is no one on the crossing is that his view is obscured, it seems to me that his duty under the regulation is plain. He must go at such a speed that if someone emerges from behind the obstruction even at the last moment he can stop. This no doubt means that he must approach a crossing very slowly when (as in this case) the driver of some other vehicle has caused it to stop upon a crossing, either lawfully in an emergency, or illegally in contravention of reg. 6. If he approaches the crossing slowly, and if no danger is apparent when he reaches it, crosses it slowly, he will have complied with the regulations. I think that the Master of the Rolls, in his reference to *Chisholm's* case (2) was, naturally and properly, if I may say so, disregarding the observations which I made in a dissenting judgment, and following the guidance given him by Scott L.J. and MacKinnon L.J. I hope, however, that I may be forgiven, especially as counsel at your Lordships' bar were agreed that the opinion as to a driver's duty which I had expressed was correct, if I say that I still adhere to it. Scott L.J. in one passage of his judgment (3) suggested that a pedestrian might reasonably essay to cross at a pedestrian crossing if the nearest approaching car was 50 to 70 yards away. If by this the Lord Justice meant that it would necessarily be negligent to cross if a car were at a less distance from the crossing than 50 yards, and that the driver of the approaching car would not then be at all to blame if he collided

(1) [1947] K. B. 930, 939.
(2) [1939] 1 K. B. 426.
(3) Ibid. 438.

with the pedestrian, I think that his dictum might give some support to the present appellants' case. I would, however, respectfully dissent from it if it is to be so construed. If it were generally accepted and acted upon, no greater protection would be given to a foot passenger on a crossing, even an "uncontrolled" crossing, than on any other part of the road: indeed, the foot passenger might be well advised to avoid pedestrian crossings, since most juries, I think, would be disposed in ordinary circumstances to attach some blame to a driver who failed to avoid a foot passenger crossing the road (not at a pedestrian crossing) in a busy London street if he had seen the foot passenger start to cross considerably less than 50 yards ahead of the driver's vehicle. I would, however, agree with Scott L.J.'s later words (1): "In the case of any "crossing where there is a likelihood of pedestrians wanting "to cross, all cars ought to reduce to a moderate speed before "they get to a point at which they become 'approaching' "cars within reg. 3." I should myself interpret the words "moderate speed," so far as reg. 3 is concerned, as meaning such a speed as permits them to stop before reaching the crossing. MacKinnon L.J. expressed his own view of the duty of a driver approaching a crossing in a different way. He assumed (2) that a reasonable speed was x miles an hour, and that at x miles an hour the driver could pull up in y feet. Then, he said, if, when a driver is going at x miles an hour, a pedestrian enters the crossing when the vehicle is less than y feet away, the driver will not have broken the regulation if he hits him. I must respectfully suggest to your Lordships that, notwithstanding the air of mathematical accuracy which the algebraical symbols employed lend to this argument, it is fallacious in so far as it overlooks the fact that no speed is reasonable which is not adjusted to the circumstances of the moment, including the fact that the driver is approaching a pedestrian crossing and may have to pull up quickly and within a very short distance. If the equivalent of x is found with proper regard to what I conceive to be the duty of a driver in such circumstances, MacKinnon L.J.'s dictum will be innocuous but it will in my opinion give no help to the present appellants. It is, I think, of some importance to notice that in *Chisholms'* case (3) MacKinnon L.J. did not hold (as Scott L.J. alone did) that there was no negligence on the part of the driver, and went

(1) [1939] 1 K. B. 426, 438.
(2) Ibid. 426, 442.
(3) Ibid. 426.

no further than to say (1) that he was doubtful whether the driver was negligent. The actual decision of the majority of the Court of Appeal in *Chisholm's* case (1) was that, in the circumstances of that case, there was contributory negligence on the part of the plaintiff. As the law then stood, that was enough to dispose of the case. In the case now before your Lordships contributory negligence is admitted. The only question before this House is whether the appellants' driver was guilty of some negligence, or of a breach of statutory duty, which was, in part, a direct cause of the respondent Mrs. Upson's injury. In my opinion, both were proved against him, and this appeal should be dismissed.

LORD MORTON OF HENRYTON. My Lords, it is conceded by counsel for the appellants that this appeal cannot succeed if it be held that the driver of the omnibus in question committed a breach of reg. 3 of the Pedestrian Crossing Places (Traffic) Regulations, 1941, and that such breach caused or contributed to the collision with the female respondent. No general proposition is involved in this concession, which is made only for the purposes of this appeal. Regulation 3 is in the following terms: "The driver of every vehicle approaching a crossing "shall, unless he can see that there is no foot passenger thereon, "proceed at such a speed as to be able if necessary to stop "before reaching such crossing."

As a convenient method of considering whether the driver in question committed a breach of reg. 3, I shall propound three questions and supply to each of them an answer which seems to me inevitable, on the admitted facts of the case. (1.) Was the driver of the omnibus during some period before the collision occurred, the driver of a vehicle "approaching a "crossing," within the meaning of reg. 3? This question can only be answered in the affirmative, and I agree with the observations of my noble and learned friend Lord du Parcq, in *Chisholm* v. *London Passenger Transport Board* (2) as to the construction of this regulation. (2.) Could the driver of the omnibus, when his vehicle was approaching the crossing, see that there was no foot passenger on the crossing? To this question, again, I think there can only be one answer, namely—he could not, because a taxi-cab obstructed his view of the crossing for a width of 5 feet. This is the result of uncontra-

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(1) [1939] 1 K. B. 426, 443.

(2) Ibid. 448–9.

H. L. (E.)

1948

London Passenger Transport Board v. Upson.

Lord Morton of Henryton.

dicted evidence, and for the present purpose it is unnecessary to enter into any discussion of the question whether the female respondent was on the pavement, or on the crossing but concealed by the taxi-cab, at the time when the omnibus was "approaching" the crossing. It is sufficient that the driver could not see, at that time, whether there was or was not a foot passenger on the crossing. (3.) Did the driver of the omnibus "proceed at such a speed as to be able if necessary to stop "before reaching such crossing?" He did not, for it did become necessary for the omnibus to stop before reaching the crossing, but the driver was unable so to stop, and the front wheels of the omnibus were *on* the crossing when the collision occurred. Whatever may be the precise meaning of the words "if necessary" I feel no doubt that it is "necessary" to stop, within the meaning of the regulation, if the driver must either stop or collide with a foot passenger. Thus, I can see no escape from the conclusion that the driver of the omnibus committed a breach of reg. 3, and I can find nothing in any other of the regulations of 1941 which leads to a contrary conclusion. If this is so the appeal must fail, as there can be no doubt that the breach of reg. 3 caused or contributed to the accident. If the driver had complied with the regulation, he would have proceeded at such a speed as to be able to stop before reaching the crossing in the event, which happened, of a person emerging from behind the obstructing taxi-cab.

For these reasons I would dismiss the appeal, but as the question whether the driver was guilty of negligence at common law was fully argued in this House and as the Court of Appeal differed on this point from Humphreys J., I add that in my judgment there was ample evidence to support the view of Humphreys J. that this question should be answered in the affirmative. The facts bearing on this question are as follows: (i.) The driver did not see the female respondent going across the pavement towards the kerb with the intention of crossing the road. The learned judge based his finding of negligence primarily on this fact, as he was satisfied that if the driver had kept a proper look-out he would have seen the lady. I agree that if the driver had looked towards the near-side pavement he would have seen her, but let me assume for the moment that his failure to look in that direction did not, taken by itself, amount to negligence. (ii.) Having failed to look towards the near-side pavement as he approached the crossing, the driver came to the crossing without knowing whether there was or was not a person, concealed by the taxi-cab, who had just stepped off the pavement and was crossing the road. In his evidence the driver, a very frank and honest witness, admitted that people in London " have a habit of crossing a road when " the lights are not in their favour." Knowing this, and not knowing whether some person would or would not emerge from behind the taxi-cab, the driver drove into the gap between the taxi-cab and the refuge in the centre of the road without reducing his speed of 15 miles an hour, and without sounding his horn by way of warning. To my mind, the failure of the driver to keep a look-out on the near-side pavement, coupled with his failure either to slow down or to sound his horn, afford ample evidence to support a finding of negligence at common law. No doubt wise pedestrians do not cross the road when the lights are in favour of oncoming traffic, but there is no regulation which forbids this, and many pedestrians are unwise. The learned Master of the Rolls said in the course of his judgment (1): " The true view, in my opinion, is that a driver " approaching a controlled crossing, whether it be controlled " by lights or by the police, with the light signal or the police " signal in his favour, is entitled to proceed on the assumption " that pedestrians will conform to the indications given to them " as to what their behaviour should be when the signals are " against them; and that he is under no duty to keep a look- " out for the possibility of a pedestrian disobeying the signals " or to drive on the assumption that a pedestrian may at any " minute do so." The Master of the Rolls proceeded: " But " let me not be misunderstood. If a driver approaching " such a crossing does in fact see that a pedestrian is crossing " or apparently is intending to cross against the signals it is " the duty of the driver to do everything that he can reasonably " do in the circumstances to avoid running the pedestrian down. " Failure to take all reasonable steps to avoid injuring someone " who is himself seen to be negligent is itself negligent." With the later passage I entirely agree, but I am unable to accept the earlier passage without qualification. In particular, I could not accept it as correct in a case such as the present where an obstruction on a pedestrian crossing prevents the driver from seeing whether a pedestrian has begun to cross the road against the signals. In such a case, I think that a driver fails to exercise due care, apart altogether from the regulations of 1941, if he proceeds on the assumption that

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(1) [1947] K. B. 930, 937.

H. L. (E.)

1948

LONDON PASSENGER TRANSPORT BOARD v. UPSON.

pedestrians will refrain from crossing the road until the lights change, and drives his vehicle in such a way that he cannot avoid an accident if a pedestrian emerges suddenly from behind the obstruction.

I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitor for appellants: *A. H. Grainger.*
Solicitors for respondents: *Bryan O'Connor & Co.*

[PRIVY COUNCIL]

J. C.*

1948

Nov. 18.

1949

Jan. 19.

NOOR MOHAMED . . . . APPELLANT;

AND

THE KING . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH GUIANA.

British Guiana—Criminal law—Charge of murder—Evidence—Tending to connect accused with another earlier death in similar circumstances not covered by the indictment—Admissibility—Principles applicable.

At the trial of the appellant, a goldsmith, on a charge of murdering a woman who was living with him as his wife by potassium cyanide poisoning, evidence, led for the purpose of meeting a possible defence of accident or suicide, was admitted that two years and four months earlier his wife had died of potassium cyanide poisoning in similar circumstances although her death had not been the subject of any criminal charge. The appellant was found guilty and sentenced to death.

Held, allowing the appellant's appeal and quashing his conviction, that the evidence in respect of the wife's death was inadmissible. It offended against the principles laid down in *Makin* v. *Attorney-General for New South Wales* [1894] A. C. 57, at p. 65, in that, first, it plainly tended to show that the appellant had been guilty of a criminal act other than that with which he was charged, for the purpose of leading to the conclusion that he was a person likely from his criminal conduct or character to have committed the offence for which he was being tried, and secondly, it could not be said to be relevant to any issue in the case. In light of the facts which, if accepted, it revealed, its admission could not be justified on any ground.

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* *Present:* LORD UTHWATT, LORD DU PARCQ, LORD OAKSEY, SIR MADHAVAN NAIR and SIR JOHN BEAUMONT.

Dictum of Lord Sumner in *Thompson* v. *The King* [1918] A. C. 221, at p. 232, examined and qualified.

Dictum of Lord Goddard L.C.J. in *Rex* v. *Sims* [1946] K. B. 531, discussed and criticized, where it was said, at p. 539, expressing the opinion of the Court of Criminal Appeal as to the proper method of approaching a question concerning the admissibility of evidence of other offences than that charged, that " if one starts with the " assumption that all evidence tending to show a disposition " towards a particular crime must be excluded unless justified, " then the justification of evidence of this kind is that it tends to " rebut a defence otherwise open to the accused ; but if one starts " with the general proposition that all evidence that is logically " probative is admissible unless excluded, then evidence of this " kind does not have to seek a justification but is admissible " irrespective of the issues raised by the defence, and this we think " is the correct view. It is plainly the sensible view."

Dictum of Kennedy J. in *Rex* v. *Bond* [1906] 2 K. B. 389, at p. 398, approved.

Maxwell v. *Director of Public Prosecutions* [1935] A. C. 309, at p. 317 and 320, referred to.

Appeal (No. 21 of 1948), by special leave, against the conviction of the appellant on June 3, 1947, at a trial by jury in the Supreme Court of British Guiana (Jackson J. Actg.) on a charge of murdering, on September 17, 1946, a woman called Ayesha, who was living with him as his wife. He was sentenced to death.

The appellant, a goldsmith, who had pleaded not guilty, was alleged to have murdered Ayesha by potassium cyanide poisoning, and the chief matter for consideration in this appeal was whether evidence was properly admitted at the trial that on May 17, 1944, the appellant's wife Gooriah had died of potassium cyanide poisoning in similar circumstances, although Gooriah's death had not been the subject of any criminal charge.

The facts appear from the judgment of the Judicial Committee.

1948. Nov. 16, 17, 18. *W. W. K. Page K.C.*, *T. B. W. Ramsay* and *A. Stone* for the appellant. The charge against the accused on which he was brought to trial was that he murdered Ayesha, and he pleaded not guilty. This plea left him at liberty to rely on any other ground of defence. When the evidence as to Gooriah's death was admitted the only

J. C.
1948
NOOR MOHAMED
v.
THE KING.

matter in issue was whether the accused did or did not murder Ayesha. No other defence was suggested by the accused. To admit evidence for the purpose of excluding in anticipation a defence which might possibly be relied on by the accused —a defence of suicide or accident—was to admit evidence which was not legally admissible because it was not relevant to the only issue to be tried. Still less could it be admitted to meet a defence which was disclaimed. When leave to lead the evidence was sought, the accused stated through his counsel that he did not suggest that Ayesha's death was caused by accident or by mistake or by any other fact. The issue to be tried was therefore a single issue—whether or not the accused murdered Ayesha. It is essential that to render any fact admissible in evidence it must be relevant to the issue to be tried. The facts relating to the death of Gooriah were not relevant to that issue. There was no logical, no causal or historical connexion between the fact of Gooriah's death and that of Ayesha ; they were two independent facts, not the effects directly or indirectly of a common cause. There was no proximity in time from which a causal connexion might be presumed ; they were separated in time by more than two years. The fact of Gooriah's death was not connected with that of Ayesha as one of a series of facts which evidenced a course of action on which the accused had embarked. This was not even suggested by the prosecution as a ground for its admission in evidence. The two facts being unconnected, the cause of Gooriah's death could not be relevant to that of Ayesha's death. Nor was evidence of facts alleged to connect the accused with the death of Gooriah relevant to the fact in issue. Even if it could be established that the accused intentionally caused Gooriah to take poison—and he was not charged with her murder at any time—that did not establish a fact relevant to the death of Ayesha. No conclusion as to intention on the part of the accused to kill Ayesha could be established by such evidence, in the absence of the first essential that the fact of Gooriah's death was relevant to the fact of Ayesha's death. The admission of this evidence vitiated the trial. It was evidence of a most prejudicial nature, and it is highly improbable that its admission did not influence the jury in coming to its decision on the question whether the appellant was guilty of the murder of Ayesha. Its admission caused a miscarriage of justice.

In using such evidence for the purpose of suggesting to the jury that the accused murdered Gooriah by a trick the prosecution invited the jury to take into consideration facts which were not admissible in evidence in the trial of the appellant for the murder of Ayesha. To suggest to the jury that they should come to the conclusion that the accused was guilty of a crime with which he was not charged was a violation of the fundamental principles of natural justice. To suggest to the jury that both Gooriah and Ayesha were murdered by the accused by means of a trick was to invite them to come to a conclusion on the fact in issue—the alleged murder of Ayesha by the accused—by taking into consideration evidence which was inadmissible. A verdict so obtained was a miscarriage of justice and affords proper grounds for the exercise of the Crown's prerogative. [During the course of the argument reference was made to the following authorities: *Rex* v. *Armstrong* (1); *Makin* v. *Attorney-General for New South Wales* (2); *Rex* v. *Bond* (3); *Rex* v. *Rodley* (4); *Perkins* v. *Jeffery* (5); *Rex* v. *Smith* (6); *Thompson* v. *The King* (7); *Rex* v. *Sims* (8) and *Ibrahim* v. *Rex* (9).]

Gahan for the Crown. The evidence relating to the death of Gooriah was properly admitted on the charge that the appellant had murdered Ayesha, and in all other respects also the appellant's trial was proper and regular. The evidence relating to the death of Gooriah is admissible to prove the appellant's criminal plan. It can be shown that he got his instruction either from his own previous experience or from the study of a reported case. When the Crown has to prove particular mens rea and to establish also the bare inference that the person who had an opportunity to kill took advantage of that opportunity, then that can be shown by reference to a previous act or acts notwithstanding that the proof of such act or acts proves the commission of another crime and the question is, does the evidence that is tendered fairly lead to the inference that it was the accused who committed the crime of which he is charged. The test of the admissibility of that evidence is the propriety of the suggested inference, and not the question of how many such acts had previously been committed, or how long ago they had been

(1) [1922] 2 K. B. 555, 567.
(2) [1894] A. C. 57, 65.
(3) [1906] 2 K. B. 389.
(4) [1913] 3 K. B. 468.
(5) [1915] 2 K. B. 702.
(6) (1915) 84 L. J. (K. B.) 2153.
(7) [1918] A. C. 221.
(8) [1946] K. B. 531.
(9) [1914] A. C. 599, 616.

J. C.
1948
Noor Mohamed v. The King.

committed. The importance of Gooriah's evidence is to show how the accused was dealing with the position which arose at the time of Ayesha's death to divert suspicion from him. [Reference was made to the alleged similarities between the deaths of Gooriah and of Ayesha.] The relevance of this evidence has to be tested by considering whether or not it is admissible to prove something that had to be proved in connexion with the death of Ayesha. The evidence respecting Gooriah's death is admissible, being merely the source of his information, which was his own experience. In the state of the evidence as to the death of Ayesha the prosecution properly sought to lead evidence concerning Gooriah's death, and that evidence was admissible on the principle of *Makin* v. *Attorney-General for New South Wales* (1). [Reference was also made to *Reg.* v. *Cotton* (2); *Reg.* v. *Heeson* (3), where it was held that " upon an indictment for murder by poison evidence " was admissible of the previous and subsequent deaths of two " other persons under like circumstances and from similar " symptoms, to show that the poisoning was not accidental " ; *Reg.* v. *Flannagan and Higgins* (4); *Rex* v. *Smith* (5); *Reg.* v. *Roden* (6); *Thompson* v. *The King* (7) and *Arthur Charles Mortimer* (8).]

A reply was not required.

1948. Nov. 18. Lord Uthwatt announced that their Lordships would humbly advise His Majesty that the appeal should be allowed and the conviction quashed, and that they would give their reasons later.

1949. Jan. 19. Their Lordships' reasons for allowing the appeal were delivered by Lord du Parcq: After hearing the arguments of counsel for the appellant and for the Crown, their Lordships announced that they would humbly advise His Majesty that this appeal should be allowed and the conviction of the appellant quashed, and would state their reasons for tendering this advice at a later date. Those reasons are set out in his judgment.

The appellant was tried before the Supreme Court of British Guiana on a charge of murdering a woman commonly known, and referred to during the trial, as Ayesha. The jury found him guilty, and he was sentenced to death. Evidence was admitted at the trial to which objection was taken by the appellant's counsel on the ground that it tended to show that the appellant had murdered another woman, his wife Gooriah. It was said on behalf of the appellant that the evidence ought to be excluded as being prejudicial to him and irrelevant. For the Crown it was contended, on grounds which it will be necessary to state later in this judgment, that the circumstances attending the two deaths made evidence concerning the earlier of them relevant to the charge. It was properly conceded at their Lordships' Board on behalf of the Crown that, if the evidence were found to have been wrongly admitted, it would follow, according to the settled principles by which their Lordships are guided in criminal cases, that the appeal must be allowed.

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(1) [1894] A. C. 57, 65.
(2) (1873) 12 Cox C. C. 403.
(3) (1878) 14 Cox C. C. 40.
(4) (1884) 15 Cox C. C. 403.
(5) (1915) 25 Cox C. C. 271.
(6) [1874] 12 Cox C. C. 630.
(7) [1918] A. C. 221.
(8) (1936) 25 Cr. App. Rep. 150.

The evidence which related directly to the charge of murdering Ayesha may be summarized as follows. The appellant's wife Gooriah died on May 17, 1944. At some time in that year Ayesha had left her husband and gone to live with him. They lived together as man and wife, and there was evidence that in the year 1945 they went through a ceremony of marriage according to the rites of the Mahomedan religion, although Ayesha's husband was still living. After the first few weeks of their union, their life together had not been happy. It was said that the appellant had often beaten Ayesha and had sometimes driven her from his house. On one occasion she had lived apart from him for two weeks, though she seems to have continued to feel affection for him, and to have been anxious to return to him. The earlier quarrels were due to the fact that the appellant suspected and accused her of infidelity. Later, he made a different charge against her. On a day in August, 1946, a neighbour named Mildred James, who employed Ayesha to do some dress-making, witnessed an assault on her by the appellant. She tried to rescue Ayesha, whereupon the appellant said, according to the witness, "Through " this woman people got to say I kill my first wife. She must " go away." Ayesha refused to go, and the appellant was alleged to have threatened her with the words, " If you can't " go alive you got to go dead." There was also evidence of a quarrel and a threat by the appellant to kill Ayesha on the night of September 16, 1946. On the morning of the following day, Ayesha died of poisoning by potassium cyanide. It must here be stated that the appellant is a goldsmith by trade and used a solution of potassium cyanide in the ordinary course of his business. He kept it in a press or cupboard. This cupboard was usually locked, but the padlock in use was defective, and it was not difficult to force the cupboard door. Potassium cyanide is a poison which acts quickly, and causes loss of consciousness in a few seconds.

Ayesha was said to have been seen alive at or after 9 o'clock in the morning of September 17. A witness called for the Crown swore that he had then seen her go with the appellant into the house in which they lived. This evidence was inconsistent with statements made by the appellant. According to him, his daughter, a child of fourteen, had awakened him shortly before 9.30 a.m. from a sleep which followed a drinking bout, and had told him that Ayesha " was frothing." He said that he had found the woman unconscious. After some delay, he had reported this to a chemist in the neighbourhood. It appeared that he had told this chemist that he had gone to fetch a doctor, but had not found him at home. He was advised to take his " wife " to hospital, and did so between 9 and 10 a.m. The appellant, at the request of the assistant dispenser there, had produced a sheet on which Ayesha had vomited. There was a stain on it which the appellant said smelled like gold solution. The assistant dispenser said he could smell nothing. Ayesha was given a stimulant by the assistant dispenser, and the appellant was advised to take her to the doctor. At 11 o'clock the appellant arrived at a doctor's surgery, bringing with him what the doctor found to be the dead body of Ayesha. A post-mortem examination showed without doubt that death was due to cyanide poisoning. It also indicated that there had been exaggeration in some of the evidence as to the more recent assaults on Ayesha by the appellant, since, although some " bruise blood " was found near the right kidney, there were no external signs of violence.

This evidence having been given, the question was argued, in the absence of the jury, whether evidence tendered as to the death of Gooriah should be admitted. The learned judge, after an elaborate argument, decided to admit it. At this stage the defence had put forward no theory as to the manner in which the poison had been taken by, or administered to, Ayesha. Later, in his final address to the jury, counsel for the defence suggested that the facts were consistent with suicide. Counsel for the appellant at their Lordships' bar laid stress on the fact

J. C.

1949

Noor Mohamed v. The King.

that, at the trial, counsel for the Crown in the course of his submission that the evidence complained of was admissible, stated, according to the note of his submission, that the appellant had said to Ayesha, " I will get rid of you as I got rid of my " first wife." This sentence certainly occurs in the notes, but their Lordships think that it must have been intended and understood as a gloss or comment on the facts proved rather than an allegation of fact. If it had been intended as a quotation from a statement made by the appellant it would have been easy for the appellant's counsel to point out, what, indeed, the learned judge would himself have observed, that there was no evidence that he had used the words imputed to him.

Their Lordships do not find it necessary to set out in any detail the evidence relating to Gooriah's death. It is sufficient to quote in full para. 7 of the respondent's case which is as follows :

" The prosecution then called a great deal of evidence " relating to Gooriah's death, including evidence of the " following facts :

" (1.) The appellant believed Gooriah to be unfaithful " and used to beat her.

" (2.) The appellant had said of Gooriah to Ayesha's " husband ' Buddy ah got a mind to poison this bitch.'

" (3.) Gooriah on the day of her death, May 17, 1944, " went to the nearby house of the appellant's brother-in-" law, carrying a piece of folded white paper wrapped in her " hand. She had had toothache and the appellant was " overheard to say to her ' You must drink this it will do " ' you good.'

" (4.) Shortly after a boy ran for the appellant shouting " ' Pawah Gooriah dead.' The appellant went to the house " and summoned Dr. Besson, who was passing.

" (5.) The accused went to the window and called a boy " to bring him a paper, similar to that which Gooriah had " had in her hand, from the yard. The boy brought the " paper which the appellant handed to Dr. Besson saying it " smelt of cyanide. The doctor found that the paper had no " substance on it and had no smell. A little later the " appellant brought the doctor an enamel cup saying ' This " ' cup smells of cyanide.' The cup was empty and had no " smell.

" (6.) Gooriah died, and Dr. Besson's examination showed

" her death to be consistent with potassium cyanide poisoning. On analysis 2 grains of potassium cyanide were found in Gooriah's stomach. Dr. Besson stated that her death was caused by cyanide poisoning."

Their Lordships now turn to the important question of law raised by this appeal. By the terms of the Criminal Law (Procedure) Ordinance in force in British Guiana the practice and procedure there are in general the same as the practice and procedure in force in criminal causes in the High Court of Justice and Courts of Assize in England. There are no special provisions in the Ordinance to which their Lordships find it necessary to refer. The first comment to be made on the evidence under review is that it plainly tended to show that the appellant had been guilty of a criminal act which was not the act with which he was charged. In *Makin* v. *Attorney-General for New South Wales* (1), Lord Herschell L.C., delivering the judgment of the Board, laid down two principles which must be observed in a case of this character. Of these the first was that " it is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried." In 1934 this principle was said by Lord Sankey L.C., with the concurrence of all the noble and learned Lords who sat with him, to be " one of the most deeply rooted and jealously guarded principles of our criminal law " and to be " fundamental in the law of evidence as conceived in this country." (*Maxwell* v. *The Director of Public Prosecutions* (2).)

The second principle stated in *Makin's* case (1) was that " the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused." The statement of this latter principle has given rise to some discussion. A plea of not guilty puts everything in issue which is a necessary ingredient of the offence charged, and if the Crown were permitted, ostensibly in order to strengthen the evidence of a fact which was not denied and, perhaps, could not be the subject of rational dispute, to adduce evidence of a previous crime, it is manifest that the protection afforded by the "jealously guarded" principle first enunciated would be gravely impaired. This aspect of the matter was considered by the House of Lords in *Thompson* v. *The King* (1). Their Lordships need not allude to the facts of that case. It is enough to say that the evidence there admitted was held to be relevant as one of the indicia by which the accused man's identity with the person who had committed the crime could be established. (See per Lord Parker of Waddington (2).) In the words of Lord Atkinson, it rebutted the defence of an alibi which otherwise would have been open (3). Nothing of the kind can be suggested in the present case. The value of the case for the present purpose is that Lord Sumner dealt particularly with the difficulty to which their Lordships have referred, and stated his conclusion as follows: "Before an issue can be said to be "raised, which would permit the introduction of such evidence "so obviously prejudicial to the accused, it must have been "raised in substance if not in so many words, and the issue "so raised must be one to which the prejudicial evidence "is relevant. The mere theory that a plea of not guilty puts "everything material in issue is not enough for this purpose. "The prosecution cannot credit the accused with fancy defences "in order to rebut them at the outset with some damning piece "of prejudice" (4).

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(1) [1894] A. C. 57, 65.

(2) [1935] A. C. 309, 317, 320.

Their Lordships respectfully agree with what they conceive to be the spirit and intention of Lord Sumner's words, and wish to say nothing to detract from their value. On principle, however, and with due regard to subsequent authority, their Lordships think that one qualification of the rule laid down by Lord Sumner must be admitted. An accused person need set up no defence other than a general denial of the crime alleged. The plea of not guilty may be equivalent to saying "Let the "prosecution prove its case, if it can," and having said so much the accused may take refuge in silence. In such a case it may appear (for instance) that the facts and circumstances of the particular offence charged are consistent with innocent intention, whereas further evidence, which incidentally shows that the accused has committed one or more other offences,

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(1) [1918] A. C. 221.
(2) Ibid. 231.
(3) Ibid. 230–1.
(4) Ibid. 232.

J. C.
1949
Noor Mohamed v. The King.

may tend to prove that they are consistent only with a guilty intent. The prosecution could not be said, in their Lordships' opinion, to be " crediting the accused with a fancy defence " if they sought to adduce such evidence. It is right to add, however, that in all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge.

Their Lordships have considered with care the question whether the evidence now in question can be said to be relevant to any issue in the case. They have asked themselves, adopting the language of Lord Sumner in *Thompson's* case (1), " What " exactly does this purport to prove ? " At the trial the learned counsel for the Crown, when submitting that the evidence should be admitted, referred to the possible defences of accident and suicide. In his address to the jury he said, according to the note, that the evidence was led " to meet the " defence of suicide," and pointed out that the circumstances surrounding the deaths of the two women " followed a similar " pattern." At their Lordships' bar it was submitted that this similarity of circumstances would lead to the inference that the appellant administered poison to Ayesha with felonious intent.

There can be little doubt that the manner of Ayesha's death, even without the evidence as to the death of Gooriah, would arouse suspicion against the appellant in the mind of a reasonable man. The facts proved as to the death of Gooriah would certainly tend to deepen that suspicion, and might well tilt the balance against the accused in the estimation of a jury. It by no means follows that this evidence ought to be admitted. If an examination of it shows that it is impressive just because it appears to demonstrate, in the words of Lord Herschell in *Makin's* case (2) " that the accused is a person " likely from his criminal conduct or character to have com-

(1) [1918] A. C. 221, 236.

(2) [1894] A. C. 57, 65.

J. C.
1949
Noor Mohamed
v.
The King.

"mitted the offence for which he is being tried," and if it is otherwise of no real substance, then it was certainly wrongly admitted. After fully considering all the facts which, if accepted, it revealed, their Lordships are not satisfied that its admission can be justified on any of the grounds which have been suggested or on any other ground. Assuming that it is consistent with the evidence relating to the death of Ayesha that she took her own life, or that she took poison accidentally (one of which assumptions must be made for the purpose of the Crown's argument at the trial) there is nothing in the circumstances of Gooriah's death to negative these possible views. Even if the appellant deliberately caused Gooriah to take poison (an assumption not lightly to be made, since he was never charged with having murdered her) it does not follow that Ayesha may not have committed suicide. As to the argument from similarity of circumstances, it seems on analysis to amount to no more than this, that if the appellant murdered one woman because he was jealous of her, it is probable that he murdered another for the same reason. If the appellant were proved to have administered poison to Ayesha in circumstances consistent with accident, then proof that he had previously administered poison to Gooriah in similar circumstances might well have been admissible. There was, however, no direct evidence in either case that the appellant had administered the poison. It is true that in the case of Gooriah there was evidence from which it might be inferred that he persuaded her to take the poison by a trick, but this evidence cannot properly be used to found an inference that a similar trick was used to deceive Ayesha, and so to fill a gap in the available evidence. The evidence which was properly adduced as to Ayesha shows her to have been acquainted, as were, it may be supposed, most of the inhabitants of the village in which the appellant lived, with the fact that suspicion rested on him in respect of Gooriah's death, and the theory that Ayesha was deceived into taking poison by a similar ruse to that which is supposed to have succeeded with Gooriah seems to their Lordships to rest on an improbable surmise. The effect of the admission of the impugned evidence may well have been that the jury came to the conclusion that the appellant was guilty of the murder of Gooriah, with which he had never been charged, and having thus adjudged him a murderer, were satisfied with something short of conclusive proof that he had murdered Ayesha. In these circumstances the verdict cannot

J. C.
1949
NOOR MOHAMED
v.
THE KING.

stand, notwithstanding the care with which the learned judge summed up the case, and the fairness with which the trial was conducted in all other respects.

Their Lordships are aware that their statement of the principles to be applied to such a case as this, and of the right way of applying them, may not accord with some, at least, of the dicta contained in a recent decision of the Court of Criminal Appeal in England, to which counsel rightly directed their attention. In *Rex* v. *Sims* (1) the Lord Chief Justice, delivering judgment, expressed the opinion of the court as to the proper method of approaching a question concerning the admissibility of evidence of other offences than that charged in these words: " If one starts with the assumption that all evidence tending to " show a disposition towards a particular crime must be " excluded unless justified, then the justification of evidence " of this kind is that it tends to rebut a defence otherwise " open to the accused; but if one starts with the general " proposition that all evidence that is logically probative is " admissible unless excluded, then evidence of this kind does " not have to seek a justification but is admissible irrespective " of the issues raised by the defence, and this we think is the " correct view. It is plainly the sensible view " (2). With all due deference to the Court of Criminal Appeal, their Lordships feel bound to say that they are not convinced that the method of approach which it thus approved has any advantage over that which it rejects as incorrect. The expression " logically " probative " may be understood to include much evidence which English law deems to be irrelevant. Logicians are not bound by the rules of evidence which guide English courts, and theories of probability sometimes cause a clash of philosophic opinion. It would no doubt be wrong to interpret the observations of the Court of Criminal Appeal as meaning that evidence can sometimes be admitted merely for the reason that it shows a propensity in the accused to commit crimes of the nature of that with which he is charged. It cannot be supposed that the court intended to lay down a proposition which would conflict with principles which have been laid down, or approved, by the House of Lords. It may be assumed that it is still true to say, as Lord Sumner said thirty years ago: " No one doubts that it does not tend to prove a man guilty " of a particular crime to show that he is the kind of man who " would commit a crime, or that he is generally disposed to

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(1) [1946] K. B. 531.

(2) Ibid. 539.

"crime and even to a particular crime." (*Thompson* v. *The King* (1).) If all that the court meant to say was that evidence of the kind specified in the first of the principles stated in *Makin's* case (2) may be admitted if it is relevant for other reasons, then the dictum has no novelty. It does seem, however, that the passage quoted was intended at least to bear the meaning that evidence ought to be admitted which is in any way relevant to a matter which can be said to be in issue, however technically, between the Crown and the accused, because a little later in the judgment the following passage occurs: "In any event, whenever there is a plea of not guilty, "everything is in issue and the prosecution have to prove the "whole of their case, including the identity of the accused, the "nature of the act and the existence of any necessary knowledge "or intent" (3). The Court of Criminal Appeal would thus appear to have rejected altogether the opinion of Lord Sumner which, although, as their Lordships have said, they believe that it must in one respect be somewhat qualified, has hitherto been generally accepted as a governing principle. Recent dicta of the Court of Criminal Appeal, though carrying great weight, do not necessarily out-weigh earlier dicta in the House of Lords or the Court of Crown Cases Reserved, or in the Court of Criminal Appeal itself, and if their Lordships have correctly understood those which they have quoted, they can only regard them as in some degree inconsistent with settled principle. Their Lordships think that a passage from the judgment of Kennedy J. in the well-known case of *Rex* v. *Bond* (4) may well be quoted in this connexion: "If, as is plain, we have "to recognize the existence of certain circumstances in which "justice cannot be attained at the trial without a disclosure of "prior offences, the utmost vigilance at least should be "maintained in restricting the number of such cases, and in "seeing that the general rule of the criminal law of England, "which (to the credit, in my opinion, of English justice) "excludes evidence of prior offences, is not broken or frittered "away by the creation of novel and anomalous exceptions."

Their Lordships respectfully approve this statement, which seems to them to be completely in accord with the later statement of the Lord Chancellor in *Maxwell's* case (5), when he said "It is of the utmost importance for a fair trial that the evidence "should be prima facie limited to matters relating to the

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(1) [1918] A. C. 232.

(2) [1894] A. C. 57, 65.

(3) [1946] K. B. 531, 539.

(4) [1906] 2 K. B. 389, 398.

(5) [1935] A. C. 309, 320.

J. C.
1949
NOOR MOHAMED
v.
THE KING.

"transaction which forms the subject of the indictment and "that any departure from these matters should be strictly "confined." They would regret the adoption of any doctrine which made the general rule subordinate to its exceptions. They must add, however, that though they have been unwilling to adopt the approach to the problem which the Court of Criminal Appeal has recommended, they of course refrain from expressing any opinion as to the propriety of the actual decision in *Sims's* case (1). It is unnecessary, and therefore undesirable, that they should do so.

Solicitors for appellant: *Hy. S. L. Polak & Co.*
Solicitors for respondent: *Burchells.*

(1) [1946] K. B. 531.

H. L. (Sc.)*

1948
May 31;
June 1, 3, 4, 7, 8;
Dec. 9.

[HOUSE OF LORDS.]

MONARCH STEAMSHIP CO., LIMITED . APPELLANTS;

AND

KARLSHAMNS OLJEFABRIKER (A/B) . RESPONDENTS.

Shipping—Bill of lading—Unseaworthiness—Delay—Nominated discharging port not reached—Outbreak of war—Discharge at another port under Admiralty orders—Cost of forwarding to nominated discharging port—Damages for breach of bill of lading contract—Remoteness of damage.

A British vessel was chartered in April, 1939, by a British company and in May bills of lading signed on behalf of the owners were issued to the charterers in respect of a cargo of 8,200 tons of soya beans shipped in Manchuria in accordance with the terms of the charterparty setting out a range of North Sea and Baltic ports. In June, Karlshamn in Sweden was nominated by the charterers as the sole port of discharge but, owing to delay caused by the vessel's unseaworthiness, she did not reach that port before the outbreak of war between Great Britain and Germany in September, when the British Admiralty prohibited her from proceeding thither and ordered the cargo to be discharged at Glasgow which she reached on October 21. A Swedish company, who in April had purchased from the charterers 8,200 tons of soya beans to be shipped on board the vessel, became indorsees of the bills of lading on October 23; they required the beans

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* *Present:* LORD PORTER, LORD WRIGHT, LORD UTHWATT, LORD DU PARCQ and LORD MORTON OF HENRYTON.

H. L. (Sc.).

1948

MONARCH STEAMSHIP CO., LD. *v.* KARLSHAMNS OLJE-FABRIKER (A/B).

for manufacture and for replacement of beans borrowed from a Swedish Government pool and incurred expense in forwarding them, in neutral ships chartered for the purpose, to Karlshamn where no soya beans were then obtainable. A war risks clause in the charterparty exonerated the owners of the vessel in the event of compliance with any orders given by the government of the nation under whose flag she sailed, as to destination, delivery or otherwise.

Held that the effective cause which brought the Admiralty orders into operation was the delay in the voyage caused by the vessel's unseaworthiness and thus the delay in carrying out the contract of carriage was attributable to the owners' default, because, in view of the international situation, they should have foreseen that war might break out and cause loss or diversion of the vessel.

Held further, that the indorsees of the bills of lading were entitled to recover from the owners the costs of transhipment which were the direct and natural consequence of the owners' failure to deliver at Karlshamn. Neither the shippers nor the indorsees were bound to accept the cargo at some place where they did not want it and the only way of placing themselves in the same position as if the contract had been performed was to engage transport to carry it to Karlshamn.

Decision of the First Division of the Court of Session (sub nom. *Karlshamns Oljefabriker (A/B)* v. *Monarch Steamship Co., Ld.*) 1947 S. C. 179 affirmed.

APPEAL from the First Division of the Court of Session.

The facts, summarized from their Lordships' opinions, were as follows: The respondents (pursuers), hereinafter called "the purchasers," were a Swedish company carrying on a manufacturing business at Norrköping, Sweden. The appellants (defenders) hereinafter called "the shipowners," were a limited company, the registered office being at Glasgow, and owners of the British steamship *British Monarch.* By a contract dated London, April 21, 1939, the purchasers, through their London agents, the Scandinavian Co-operative Wholesale Society purchased from Mitsui & Co., Ld., described as of London, hereinafter called "the charterers," under a c.i.f. contract, 8,200 tons of Manchurian soya beans "to be shipped "from . . . . Rashin . . . . . per S.S. *British Monarch.*" The price was 8*l.* 6*s.* 3*d.* a ton (or about 68,828*l.*). Presumably in anticipation of this contract, the charterers, by a voyage charterparty dated April 4, 1939, wherein they were described as "of London, merchants," chartered the shipowners' vessel. The charterparty provided "that the said vessel "shall, after completion of present voyage . . . . proceed "to Rashin . . . . and . . . . being tight, staunch, and "strong and in every way fitted for the voyage, shall . . . . "load . . . . a full and complete cargo of soya beans . . . . "not exceeding 8,610 gross tons . . . . . and . . . . shall ". . . . proceed with all possible speed under steam, via "Suez Canal, to Rotterdam, Hamburg, Hull, Esbjerg, Aarhus, "Copenhagen, Karlshamn, Stettin, one or two ports at "charterers' option." The charterparty contained the usual exceptions (but no exception of unseaworthiness) and there was annexed to it a war risks clause: "(1.) No bills of "lading to be signed for any blockaded port and if the "port of discharge be declared blockaded after bills of "lading have been signed, or if the port to which the ship "has been ordered to discharge either on signing bills of "lading or thereafter be one to which the ship is or shall "be prohibited from going by the government of the nation "under whose flag the ship sails or by any other government, "the owner shall discharge the cargo at any other port covered "by this charterparty as ordered by the charterers (provided "such other port is not a blockaded port as above-mentioned) "and shall be entitled to freight as if the ship had discharged "at the port or ports of discharge to which she was originally "ordered. (2.) The ship shall have liberty to comply with any "orders or directions as to departure, arrival, routes, ports of "call, stoppages, destination, delivery or otherwise howsoever "given by the government of the nation under whose flag the "vessel sails or any department thereof, or any person acting "or purporting to act with the authority of such government "or of any department thereof, or by any committee or person "having, under the terms of the war risks insurance on the ship, "the right to give such orders or directions and if by reason of "or in compliance with any such orders or directions anything "is done or is not done, the same shall not be deemed a "deviation, and delivery in accordance with such orders or "directions shall be a fulfilment of the contract voyage and the "freight shall be payable accordingly." With regard to this clause, it was stated in evidence by George Sheriff, assistant manager to the shipowners' chartering agents, that in April, 1939, "the international situation was considerably over-"clouded. The possibility of war was in the minds of my "company. There was a special war risks clause added to the "charter in a slip attached." The vessel sailed to Rashin in Manchuria in fulfilment of the charter and there loaded from

H. L. (Sc.).

1948

MONARCH STEAMSHIP CO., LD. *v.* KARLSHAMNS OLJEFABRIKER (A/B).

Mitsui Busson Kaisha, Ld. of Dairen, as agents for the charterers, a full and complete cargo of soya beans. Sixteen bills of lading were signed at Rashin by the master in respect of the cargo, all of them dated May 6, 1939. The total quantity in the aggregate under the bills of lading was about 8,200 tons. The bills of lading covered the same range of discharging ports as the range provided for in the charterparty. They also contained the usual exceptions and a full negligence clause. They further provided that "all the above exceptions are "conditional on the vessel being seaworthy when she sails "on the voyage, but any latent defects in the hull and/or "machinery shall not be considered unseaworthiness, provided "the same do not result from want of due diligence of the "owners, or any of them, or of the ship's husband or manager." The beans were to be delivered to the charterers or their assigns, "they paying freight at the rate stipulated in charterparty "dated London, April 4, 1939, and all other terms, conditions "and exceptions to be as per said charterparty." The vessel sailed on May 12, 1939, and Karlshamn was nominated on June 7, 1939, as the sole port of discharge. The voyage should normally have taken about sixty days and the vessel should have been in European waters by about the middle of July but her speed was slow owing to the defective condition of the boilers. The evidence as to the cause of this condition was as follows: Before proceeding to Rashin the vessel had been on time charter to Yamashita Kisen Kaisha of Kobe under a charterparty dated October 11, 1938. By the terms of this document the charterers had to supply the bunker coal required and it appeared that the coal which they had furnished was of bad quality and affected the tubes of the vessel's boilers causing deterioration. The shipowners were aware that bad coal had been used and that there had been much trouble with the boiler tubes but they did not know that the evaporator and the main condenser were out of order. On March 26, 1939, the master had reported that he believed "there is little or nothing wrong with the steamer and that "it is the coal that is at fault" and that a surveyor at Singapore who had examined everything in the engine-room and stokehold could find nothing wrong. Accordingly, the shipowners hoped that a fresh supply of coal would prove sufficiently efficient. The Japanese coal supplied for the voyage from Rashin, with which the vessel was mainly bunkered, was likewise of poor quality but nothing better was procurable.

Owing to the condition of the boilers, trouble occurred more than once, reducing speed from 9½ knots to about 5 knots, and, for her safety, the vessel was diverted to Colombo for repairs, in particular to choked and leaking boiler tubes. She arrived on June 29 and left on July 18. She reached Aden on August 4 and after completion of further boiler repairs left on August 16. She reached Port Said on August 30 and was again detained for further repairs until September 24. Meanwhile war between Great Britain and Germany had broken out on September 3. In consequence of the war the British Admiralty prohibited the vessel from proceeding to Karlshamn and ordered her to proceed to and discharge at Glasgow. On the last lap of the voyage her speed was not unreasonably slow and she reached Glasgow on October 21. On arrival at Glasgow the boilers were surveyed; renewal throughout was found necessary and was in fact carried out. The charterers paid the freight on October 23. On the same day the purchasers took up and paid for the bills of lading and thereby became the indorsees. The cargo was accordingly discharged and delivery was made to them. It was not until August 14, when the shipowners were informed by the purchasers' agents that they were the receivers of the goods, that they had learnt that anyone but the charterers was interested in them. The purchasers required the beans for their business intending to use them for the purposes of their factory. They had expected them to arrive at Karlshamn before the end of July and no other soya beans were procurable there. Accordingly, being short of supplies, they were obliged, for lack of them, to invoke the help of the Swedish Government, which gave them some beans on loan on the terms of being repaid an equivalent quantity on the vessel's arrival. The purchasers, therefore, now required some of the beans for this purpose and the rest to keep their factory at work. Accordingly, although the price at which the British Government would have requisitioned at Glasgow was *8l.* 17*s.* 6*d.* a ton and it was not proved that more could have been obtained in the open market at Karlshamn, the purchasers, having been granted permission by the British Government, through the Ministry of Economic Warfare and the Ministry of Food, chartered three smaller Swedish vessels to proceed with the beans to Karlshamn, where they were eventually delivered. The cost of transhipment was 22,134*l.* 7*s.* 4*d.* and it was admitted that it could not have been arranged more economically.

The purchasers raised an action against the shipowners to recover the sum of 22,134*l.* 7*s.* 4*d.*, as the loss naturally and directly resulting from the shipowners' breach of contract in respect of unseaworthiness. The deviations necessitated by the unseaworthiness alleged were not separately founded on. There was a considerable body of evidence and the proof lasted from November 20, 1945, to February 7, 1946. The Lord Ordinary (Lord Sorn) found that the vessel was unseaworthy on sailing from Rashin and by two interlocutors dated respectively May 6 and 14, 1946, decerned against the shipowners for payment of 21,634*l.* 7*s.* 8*d.* and found them liable in expenses. (One item of 500*l.* in the claim of the purchasers was disallowed by him as irrecoverable.) He held that notwithstanding that no breach of the bill of lading contract was committed by the shipowners in delivering at Glasgow, yet they remained liable for such loss to the purchasers as resulted from the unseaworthiness of the vessel. He further held that it should have been in the contemplation of the shipowners that a protracted voyage would lead to diversion on account of war and a costly transhipment to Sweden and that in the special circumstances of this case the cost of transhipment was not too remote to be recovered by the purchasers as damages for breach of the warranty of seaworthiness. Before the Inner House the shipowners admitted that the vessel was unseaworthy but claimed that only nominal damages were recoverable but the First Division of the Court of Session adhered to the interlocutors of the Lord Ordinary. The shipowners appealed to the House of Lords.

Sir William McNair K.C. and *Eustace Roskill* for the appellants (the shipowners). The purchasers are not entitled to recover the sum they claim or any sum or, if any damages are payable, they can be merely nominal. The contract was never an unqualified contract to go to Karlshamn. It provided for alternatives in certain events and the vessel was only obliged to go there if the British Government permitted. Delivery there was in fact prohibited by Admiralty orders, which the shipowners were bound to obey, and became illegal; in accordance with those orders, the vessel delivered the cargo at Glasgow. This was a proper delivery under the war risks clause incorporated in the bills of lading and the shipowners were, under the contract, entitled to comply. Performance in accordance with the agreed terms cannot be a breach of con-

H. L. (Sc.).

1948

MONARCH STEAMSHIP CO., LD. *v.* KARLSHAMNS OLJEFABRIKER (A/B).

tract. The unseaworthiness does not displace the original contract nor disentitle the shipowners from relying on the terms of the contract as regulating the mode of performance. It was the initial unseaworthiness that was the reason for the deviation and a deviation to remedy unseaworthiness is not unjustifiable unless the vessel's condition was known to the shipowners before the sailing. The purchasers have not shown that there was such knowledge and the shipowners are not debarred by the mere fact of unseaworthiness from relying on the terms of the contract, since no physical loss resulted. On this point there are no authorities against the shipowners' contentions. See *The Europa* (1); *Kish* v. *Charles Taylor, Sons & Co.* (2), and Scrutton on Charterparties (11th ed.), p. 430; (15th ed.), p. 434. Moreover, it was not the unseaworthiness that caused the change of destination from Karlshamn to Glasgow, but the Admiralty orders, which may be regarded as coming within the exception restraint of princes. After the vessel had been repaired at Port Said her physical state would not have prevented her from reaching Karlshamn and unseaworthiness was no longer an active element in preventing her from doing so. The Admiralty orders were an independent executive act act applying to all ships, whether seaworthy or not. The unseaworthiness was only an indirect cause and therefore was causally irrelevant: see *The Malcolm Baxter Jr.* (3). The principles on which that case was decided are accurately stated and the facts are indistinguishable. *Smith, Hogg & Co., Ld.* v. *Black Sea and Baltic General Insurance Co., Ld.* (4) is distinguishable because in that case there were two concurrent physical causes of the loss, while, in the present case, unseaworthiness had ceased to operate and the Admiralty orders were the sole reason for the interruption of the voyage. Even on the hypothesis that the failure to deliver at Karlshamn was a legal consequence of the initial unseaworthiness the cost of the transhipment cannot be recovered as damages for that unseaworthiness. The breach of contract alleged is not failure to deliver at Karlshamn but initial unseaworthiness from which it is claimed the transhipment costs flow. But these costs did not flow naturally and directly from that unseaworthiness; they flowed from special circumstances peculiar to the purchasers which were not communicated to the

(1) [1908] P. 84.

(2) [1912] A. C. 604.

(3) (1928) 31 Ll. L. Rep. 200; 277 U. S. 323.

(4) [1940] A. C. 997.

shipowners. The shipowners never accepted the contract on the basis of those special circumstances or on terms that they should be liable for damages of this sort, for these costs were only incurred by reason of the purchasers' decision to tranship the beans to keep their factory going and to replace those lent them from the Swedish Government pool. There was no evidence as to the extent of the purchasers' obligations to the Swedish Government or the penalties, if any, to which they would be exposed if they failed to replace the beans. The law as to the measure of damages is accurately stated in Anson on the Law of Contract (19th ed.), p. 361: see also *Liesbosch* (*Owners*) v. *Edison* (*Owners*) (1) where Lord Wright commented on *In re an Arbitration between Polemis and Furness Withy & Co., Ld.* (2). On the basis most favourable to the purchasers, the transhipment costs were incurred to minimize loss by delay. But this form of loss is irrecoverable, for damages for delay in delivery are not awarded in the case of carriage of goods by sea: see *The Parana* (3) and *Dunn* v. *Bucknall Bros.* (4). *Stroms Bruks Aktie Bolog* v. *Hutchinson* (5) is distinguishable. If this form of loss is itself irrecoverable, the alternative expenditure by way of mitigation of loss is also irrecoverable whether by the purchasers or by Mitsui. To award such damages would involve extraordinary and uncontemplated hardship on the shipowners. *Horne* v. *Midland Ry. Co.* (6) applies here; it is still the leading case on this subject and has never been adversely commented on. See also *British Columbia and Vancouver Island Spar, Lumber and Saw Mill Co., Ld.* v. *Nettleship* (7). *James Finlay & Co., Ld.* v. *Kwick Hoo Tong Handel Maatschappji* (8) is distinguishable and deals with a different problem. The damages claimed do not come within the rules laid down in *Hadley* v. *Baxendale* (9), for neither of the two limbs of the proposition there propounded applies. (*a*) The damages did not arise "naturally," since several disconnected events had to occur to produce the result that followed: the outbreak of war and its consequences, diversion to this country, release of the goods by the Ministry of Food, the

(1) [1933] A. C. 449, 461.
(2) [1921] 3 K. B. 560.
(3) (1877) 2 P. D. 118.
(4) [1902] 2 K. B. 614.
(5) [1905] A. C. 515.
(6) (1872) L. R. 7 C. P. 583; (1873) L. R. 8 C. P. 131.
(7) (1868) L. R. 3 C. P. 499.
(8) [1928] 2 K. B. 604; [1929] 1 K. B. 400.
(9) (1854) 9 Ex. 341, 354.

purchasers' decision to tranship them rather than sell them in Glasgow at a price above the contract price, a decision dictated by three factors (i.) the fact that the purchasers were manufacturers ; (ii.) the circumstance that they were short of beans, and (iii.) their having borrowed beans from the Swedish Government and being pledged to replace them. Each of these events had to occur in order to produce the result. The transhipment costs were not therefore the natural result of the unseaworthiness ; they did arise, not in the ordinary way, but out of special facts peculiar to the purchasers not communicated to the shipowners and they were not incurred in mitigation of a proved recoverable loss. (*b*) The consequences of the breach were not in the contemplation of both parties at the time of the contract, the charterparty of April 4, 1939. The contemplation of the parties must be fixed at the time the contract was made. In it, Mitsui, the charterers, were described as " of London, merchants." The commodity was beans, and ordinary articles of commerce. The charterparty named a wide range of ports, including Hull in the United Kingdom. It cannot be inferred, however, that a diversion from Sweden to the United Kingdom was contemplated as probable. (iii.) The further observations in *Hadley* v. *Baxendale* (1) do not apply because no notion of the special facts out of which the damages arose was given to the shipowners and a fortiori there was no agreement to accept the contract on the basis of those special facts. Moreover, the contract was made with the charterers and continued to be with them on the terms of the charterparty until the bills of lading were transferred to the purchasers two days after the vessel reached Glasgow. The shipowners, when they entered into the contract knew only the charterers. If the vessel failed to deliver at the nominated port the sole damage sustained by the charterers was such sum as they lost, which would normally be measured by the difference between the price obtainable for the goods at the named port and that receivable at the place where they were actually delivered. Here there was no loss because the price the British Government would have paid at Glasgow was more than the sale price and it was not established that more could have been obtained in the open market at Karlshamn. It was the purchasers' duty to minimize the damage or nullify it by selling elsewhere for the charterers could not increase the damages payable by transferring the bills of lading to the purchasers after the vessel

(1) 9 Ex. 341, 355.

H. L. (Sc.).

1948

Monarch Steamship Co., Ld. v. Karlshamns Oljefabriker (A/B).

reached Glasgow. After the passing of the Bills of Lading Act, 1855, the holders of a bill of lading could transfer any right which they themselves possessed under it, but nothing more. The rights of an indorsee of a bill of lading to sue the shipowner are purely statutory, for before the Act the property in the goods could be transferred to them but not the benefit of the contract of carriage. Now under s. 1 of the Act the indorsee, takes over the right of suit of the original shipper, but that means no more than the rights as at the date of indorsement, viz., the indorser's rights, which are not to be ascertained by reference to any facts peculiar to the indorsee. The rights are not to be ascertained retrospectively as at the date of shipment, for, as a pure matter of construction, that would involve reading into the Act words which are not there so that s. 1 would contain the phrase " as if the contract contained in the " bill of lading had *at the time of shipment* been made with " himself," whereas the words in italics are not there. *Hain Steamship Co., Ld.* v. *Tate & Lyle, Ld.* (1) did not deal with the present question. As to the relevant principles see Scrutton on Charterparties (15th ed.), pp. 52, 54, 217, note (*x*), and 249 note (*b*) (see also 11th ed., p. 56). Applying these principles to the present case, as the charterers could recover no damages, the purchasers, their assignees, could recover none either. The rights of the parties were to be ascertained by reference to the position on October 23, 1939. Whichever way the matter be regarded the purchasers cannot succeed. If they take the bills of lading subject to the position at the time of the indorsement, then under the contract the proper destination is Glasgow If, on the other hand, they are deemed to be parties to the contract made at the date of shipment, even in the hands of the charterers this contract has become a contract for delivery at Glasgow. Moreover, the purchasers could not even obtain damages against the charterers who had fulfilled their c.i.f. contract by furnishing valid bills of lading, the contractual insurance policies and the appropriate invoices. Further, the contract was frustrated and accordingly, the claim for damages must fail: see *F. A. Tamplin Steamship Co., Ld.* v. *Anglo-American Petroleum Products Co., Ld.* (2); *James Scott & Sons, Ld.* v. *Del Sel* (3) and *Heyman* v. *Darwins, Ld.* (4).

Eustace Roskill following. Assuming that the indorsed bills of lading had a retrospective effect, nevertheless till October 23,

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(1) (1936) 155 L. T. 177.

(2) [1916] 2 A. C. 397, 406.

(3) 1923 S. C. (H. L.) 37.

(4) [1942] A. C. 356.

1939, they operated as receipts and no more. The contract of carriage was the voyage charterparty made with the charterers on April 4, 1939, and it did not contain an unconditional obligation to go to any of the range of ports named in it, nor was there an unconditional obligation after June 7 when Karlshamn was nominated as the port of discharge. The obligation was qualified by the shipowners being accorded different rights, including an alternative mode of performance, on the happening of any of the conditions subsequent for which the charterparty made provision. The bills of lading, even when operating only as receipts, incorporated all the terms of the charterparty. The condition subsequent relating to government orders operated before October 23, 1939, while the only contract was the charterparty. By then the charterparty had therefore taken effect as a contract of carriage to Glasgow and the charterers' only rights were delivery in Glasgow and nominal damages for unseaworthiness. The bills of lading incorporated all the terms of the charterparty and were subject to the same conditions subsequent. This view of the matter reconciles the obligations as to place of delivery and avoids imposing on the shipowners in that respect greater obligations than those imposed by the charterparty ; it does not give the indorsees of the bills of lading (the purchasers) greater rights against the shipowners than the indorsers (the charterers) had, and, therefore, it is consistent with the Bills of Lading Act, 1855, s. 1. The purchasers had the right to have the goods delivered at Glasgow. All pre-existing rights of the charterers were transferred to them by reason of the operation of the Act but they did not get any rights enabling them to maintain this action because they cannot complain of non-delivery at Karlshamn and their claim is not one which the charterers could have advanced.

L. Hill Watson and *George Reid* (both of the Scottish Bar) for the respondents (the purchasers). The shipowners' undertaking was to carry the cargo to one of a range of ports at the option of the charterers or of the persons to whom they might indorse the bills of lading. The option was exercised in favour of Karlshamn and at all material times this was a contract to deliver there. The shipowners should have delivered the cargo within a reasonable time and they failed to do so because of their breach of warranty of the vessel's seaworthiness. From her previous bad performance they knew when she left Rashin that she was not seaworthy. If the voyage had not been unduly long she would have reached Karlshamn long before war broke out and it would not have been necessary for the purchasers to hire additional ships, as they were entitled to do, to carry out the contract themselves. They were entitled to charge the shipowners with this additional expense and the charterers could have advanced a like claim. Being already in breach of the warranty of seaworthiness, as the result of which the goods did not reach Karlshamn before war broke out, the shipowners are not entitled to invoke the war risks clause in the charterparty and the bills of lading, a clause which is really an elaboration of the restraint of princes clause. They cannot rely on this clause because they have failed to use reasonable care and diligence: see *Thomas Wilson, Sons & Co.* v. *Xantho* (*Cargo Owners*) (1) and Scrutton on Charterparties (15th ed.), pp. 226, seq. All the exceptions are subject to the vessel's seaworthiness. Owing solely to the unseaworthiness the vessel was not at Karlshamn until after war had broken out and, being then in breach of their contract the shipowners were not excused by the war risks clause or relieved from liability for the costs of the consequent transhipment: see *Brandt* v. *Liverpool, Brazil and River Plate Steam Navigation Co., Ld.* (2). The shipowners realized the danger of an outbreak of war, as shown by the inclusion of the war risks clause, and they cannot invoke that clause since it was brought into operation as a result of their breach of contract: see *Steel* v. *State Line Steamship Co.* (3). The delay resulting from the breach of contract to provide a seaworthy ship entailed consequences for which they are liable, whether or not they could reasonably have anticipated them: see *The Wilhelm* (4). The unseaworthiness was the direct cause of the damage and *The Malcolm Baxter, Jr.* (5) can be distinguished on the facts. Though, if the ship had reached Karlshamn in July, there could have been no claim against the shipowners in respect of unseaworthiness, because there would have been no loss, yet but for the unseaworthiness there would have been no damage now, even though another cause, Admiralty direction, was also present. The case of *Smith Hogg & Co., Ld.* v. *Black Sea and Baltic General Insurance Co., Ld.* (6) shows that if there was unseaworthiness the mere fact that another cause concurred did not prevent an action from lying, although on the concurring cause alone there would have been no cause of action. The principle of this decision is not limited to cases where there is physical damage: see *The Glenfruin* (1). The purchasers as indorsees can bring this action in respect of the loss sustained, by virtue of s. 1 of the Bills of Lading Act, 1855, as if the contract in the bills of lading had at the time of shipment been made with themselves: see Scrutton on Charterparties (15th ed.), pp. 52 and 189-90. The shipowners were informed on August 16, 1939, by the purchasers' agents that they were the receivers of the goods. As to damages, one must treat the position here as reasonable commercial men would do. The normal procedure when goods are not delivered at the place agreed is to tranship them and take them to the proper place but if similar goods can be bought at the place of destination for less, one should not tranship the cargo. The same principle applies if one can purchase such goods at some comparatively nearby place. When, however, shipowners contract to carry goods from A. to B., they must assume that the goods are wanted at B., and in a case where the purchasers tranship them in order to get them there it is for the shipowners to show that the transhipment is unreasonable. Here, as reasonable business men, the purchasers had no other source of beans. They are not claiming damages for a fall in the market price but for failure to deliver at the proper place. The value of the beans is not to be measured by the Glasgow price, for the value of the cargo should not be taken at a place where it is not required to be delivered. In measuring damages of this nature one is in the realm of fact. The principle underlying the whole object of damages for breach of contract is to place the pursuers in the same position as if the contract had been fulfilled, so far as money can do it: see *Connal, Cotton & Co.* v. *Fisher Renwick & Co.* (2) and *Ströms Bruks Aktie Bolog* v. *Hutchinson* (3).

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(1) (1887) 12 App. Cas. 503, 515.
(2) [1924] 1 K. B. 575.
(3) (1877) 3 App. Cas. 72.
(4) (1866) 14 L. T. 636.
(5) 31 Ll. L. Rep. 200; 277 U. S. 323.
(6) [1940] A. C. 997.

Sir William McNair K.C. in reply. In this case there are striking similarities to *The Malcolm Baxter, Jr.* (4) the decision in which purports to be based on English cases. If it had been decided in the House of Lords it would be binding in this case on the facts. It is a decision of the Supreme Court of the United States and it is proper for this House to follow it unless it is plainly wrong because the courts of the world follow the decisions of the Supreme Court in shipping matters and it is important that the rulings of the supreme tribunals in all countries should be the same; otherwise a plaintiff could choose the jurisdiction of which the law suited him best. As to unseaworthiness, this is admitted but it is denied that the shipowners had actual knowledge of it. The law relating to the undertaking of seaworthiness is set out in Scrutton on Charterparties (15th ed.), p. 93, seq., art. 29. The purchasers' main case against the shipowners was that they were under a contractual duty to deliver at Karlshamn about July. This is a wrong statement of the contractual obligation. The obligation was to provide a seaworthy ship and to proceed with reasonable dispatch and without deviation, but there is a difference between saying that if the ship had been seaworthy and had proceeded with reasonable dispatch she would have reached Karlshamn in July and saying that there was a contractual obligation to reach Karlshamn in July. The obligation as regards proceeding with reasonable dispatch is qualified by *Kish* v. *Charles Taylor, Sons & Co.* (1) and the obligation to go to Karlshamn was subject to the terms of the bills of lading. In this case the war risks clause was not displaced because there was no deviation as distinct from the unseaworthiness. There was no breach of the obligation to proceed without delay because this was a case where it was necessary to delay to remedy unseaworthiness. If this be regarded as a claim for damages for unseaworthiness, that was not the cause of the stopping of the voyage at Glasgow any more than in a case of delay due to unseaworthiness the fact that the ship is subsequently torpedoed can be said to be the result of the unseaworthiness. The obligation to proceed with dispatch and the obligation to proceed without deviation are different facets of the same obligation. There is no distinction between deviation in time (viz., going too slowly) and deviation in place. In *Smith, Hogg & Co., Ld.* v. *Black Sea and Baltic General Insurance Co., Ld.* (2) the House of Lords was dealing merely with the physical causes of a physical disaster. Physical unseaworthiness existed up to the moment of that disaster and was a concurrent cause with another physical cause. No new law was laid down in that case which is distinguishable from the present. On the question of damages the purchasers' proposition is unsound. The normal measure of damages should apply, viz., what they would have got for the goods at

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(1) (1885) 10 P. D. 103.
(2) (1883) 10 R. 824.
(3) [1905] A. C. 515.
(4) 31 Ll. L. Rep. 200; 277 U. S. 323.

(1) [1912] A. C. 604.

(2) [1940] A. C. 997.

the port of destination less what they would have got at the port where the goods were in fact delivered; that would put them in the same position, so far as money can do so, as if there had been a proper delivery. The purchasers cannot recover more than the charterers could have done and the maximum they could have recovered would have been the difference in value just stated, because they were buying for re-sale. There was no evidence that it would have been fair and reasonable for them as merchants to spend 21,634*l.* 7*s.* 4*d.* in conveying the beans from Glasgow to some other port, nor is there any evidence that their value was greater at Karlshamn.

The House took time for consideration.

Dec. 9. Lord Porter. My Lords, under the terms of the charterparty the appellants were under contract to supply a seaworthy ship and this they failed to do. According to the finding of the Lord Ordinary, she was unseaworthy on sailing from Rashin and the appellants have accepted this finding and argued their case on that footing. It was suggested to your Lordships that not only was the vessel unseaworthy on sailing but that the owners knew of that unseaworthiness. I doubt whether this contention was open to the pursuers on the pleadings and there is no sign of its consideration in the opinion of the Lord Ordinary or the Inner House. But, even if it were open, I do not think it has been established. It is true that the appellants knew that there had been trouble with the boiler tubes and that their time charterers had been using bad coal, but they had been informed that the vessel had been surveyed and nothing found wrong and they always hoped that a fresh supply of coal would prove efficient or anyhow efficient enough. Moreover, actual knowledge of unseaworthiness must be shown, and mere imprudence or carelessness is not knowledge. The owners must therefore be absolved from the guilt of sending their ship to sea in an unseaworthy state with knowledge of that unseaworthiness. Nevertheless, the defects were there and entailed a considerable prolongation of the voyage.

The cost of transhipment was 22,134*l.* 7*s.* 4*d.*, the sum sued for in the action, and, whatever the rights of the parties may be, it is not contended that this sum was an unreasonable amount to pay for the carriage on to Sweden at that time and in war conditions. This sum the respondents say they were entitled to recover as damages for the appellants' breach of contract. The argument runs as follows: the undertaking was to carry the beans to one of a range of ports at the option of Mitsui or of those to whom they transferred the bills of lading; the option was exercised in favour of Karlshamn; the appellants failed to carry out their obligation and accordingly the respondents had the right to fulfil the contract themselves and to charge the appellants with the cost of doing so; the appellants should have delivered the beans at Karlshamn within a reasonable time, they failed to do so because of their breach of contract to provide a seaworthy ship, and the additional expense of carrying out the contract must therefore fall on them. If they had not taken so unduly long a time the *British Monarch* would have arrived at Karlshamn long before the outbreak of war and the hire of the three additional ships would have been unnecessary.

In opposition to this argument the appellants maintain that the respondents are not entitled to recover this or any sum. They rely in the first place upon the provisions of the charterparty and the bills of lading which incorporate its terms, and in particular upon the war clause attached to it. Indeed, without the war clause they contend that they fulfilled their obligations, since after the outbreak of war the ship was under a duty to obey the orders of the British Admiralty and it became illegal for the owners to proceed to or to discharge at any port other than Glasgow. They accept the finding that the vessel was unseaworthy and deviated to Colombo, but say that the reason for the deviation was the initial unseaworthiness, and that deviation to remedy unseaworthiness is not unjustifiable unless the state of the vessel was known to her owners before she sailed. Such knowledge, they contend, has not been established and the mere existence of unseaworthiness does not prevent a shipowner from relying upon the terms of the charterparty or bill of lading unless physical loss is caused by the unseaworthiness itself. It is claimed that in the present case loss was not so occasioned and consequently the terms and exceptions contained in the documents remained in force until the termination of the voyage at Glasgow, which, in the events which happened and in accordance with the terms of the war clause, became her contractual port of discharge, and, indeed, the only port to which she could legally go. For this proposition reliance is placed upon *The Europa* (1) and *Kish* v. *Charles Taylor, Sons & Co.* (2).

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(1) [1908] P. 84.

(2) [1912] A. C. 604.

Undoubtedly deviation necessarily made to remedy unseaworthiness does not amount to unjustifiable deviation or destroy the right to rely upon the terms of the contract of carriage unless it is established that the owners knew of the vessel's state on sailing. As indicated above, no such knowledge has been brought home to the appellants and therefore they continue to be entitled to rely upon the war clause. Nevertheless, it has to be considered whether the delay due to initial unseaworthiness was not the factor which brought that clause into operation, and so caused the diversion of the ship to Glasgow and her failure to reach Karlshamn. On behalf of the appellants, it is said that the unseaworthiness was not the cause of the change of destination. The immediate cause was the order of the British Admiralty. After repairs had been effected at Port Said there was nothing in the physical condition of the ship to prevent her from proceeding to or reaching Karlshamn. Admiralty orders, on this argument, were an independent executive act applying to all ships whether seaworthy or not and this vessel was never under an absolute obligation to go to Karlshamn; she need only go there provided the British Government permitted. As they did not, she must obey and go to Glasgow.

It cannot, of course, be denied that those orders were binding upon her, but that concession does not end the matter; it has still to be determined whether the effective cause which necessitated those orders and made obedience compulsory was not the delay in the voyage which was brought about by her unseaworthiness on sailing from Rashin. The appellants say that this was only an indirect cause, and therefore historically true but causally irrelevant, and in support of this part of their argument rely upon the principles enunciated in the American case of *The Malcolm Baxter, Jr.* (1). The unseaworthiness, they say, had come to an end or at any rate was not, after Port Said, an active element in preventing the ship reaching Karlshamn. The case was not like *Smith, Hogg & Co., Ld.* v. *Black Sea and Baltic General Insurance Co., Ld.* (2), where there were two concurrent physical causes of the loss. Here the unseaworthiness had ceased to operate and the sole reason preventing the continuance of the voyage to Sweden was the control of the British Government. Speaking for myself, I am unable to distinguish the principles adopted in the American case from those which must be applied in this, save on one matter, viz.: whether before the ship sailed her diversion by government orders could reasonably have been foreseen. If the American case is applicable and rightly decided the appellants should, I think, succeed. It is therefore necessary to analyse that decision and consider whether it is right and whether it correctly represents the law of England.

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(1) (1927) 28 Ll. L. Rep. 290; (1928) 31 Ll. L. Rep. 200; 277 U. S. 323.

(2) [1940] A. C. 997.

The facts are, indeed, very much like those existing in the present case. The *Malcolm Baxter*, which was a sailing vessel, was unseaworthy on sailing but not unseaworthy to the knowlege of her owners. The result of her unseaworthiness was, however, that she had to deviate in order to effect repairs at Havana, and whilst those repairs were being effected the United States Government levied an embargo which prevented any sailing vessel from clearing for a voyage to Bordeaux, which was her port of destination, or for any port within the war zone. The vessel thereupon sailed for New York and delivered her cargo there, relying on the exception of the "restraint of "princes, rulers, and people" contained in the bills of lading and also on the illegality of proceeding on her original voyage. It was argued in that, as in this, case that the unseaworthiness was known to the owners, or at any rate that they were negligent in failing to discover it before she sailed. Knowledge by the owners was negatived by the court and negligence without knowledge was held, as it would be held in this country, not to be material as an element in depriving the owners of the protection of the terms of the bills of lading. As to the delay caused by the embargo, it was held that the bill of lading holders could not recover, because the change of destination was within the exceptions of the bills of lading and because, exception or no exception, whilst the embargo continued it would have been illegal to proceed with the voyage, It was urged, however, that it was the delay caused by her unseaworthiness which brought the vessel within the excepted peril. This argument was rejected on the ground that the delay was the occasion and not the cause of the operation of the embargo. It was, so the court held, no more its cause than delay which caused goods to be brought within the path of a flood would be the cause of their destruction. To one other circumstance existing in that case attention must be called, viz.: the statement in the judgment of Stone J., where he says (1): "There is no finding, nor is it suggested, that at the "time when the contract of affreightment was entered into, "or when the vessel broke ground, the embargo could "reasonably have been foreseen, or that there were any special "circumstances charging petitioners with the knowledge or "expectation that the unseaworthiness or consequent delay "would bring the vessel within its operation."

My Lords, in my view the overriding fact which led to the decision in that case is to be found in the words just quoted. Whether the same result would have been arrived at if there had been reason for the owners to apprehend a state of affairs in which delay would bring the war clause into operation is left undetermined. It was upon this differentiation of fact that Lord President Normand founded his decision in the present case. In his view the appellants should reasonably have foreseen the likelihood of the imposition of an embargo. In forming this opinion he relied upon the insertion of the war clause in the charterparty, coupled with the evidence of Mr. George Sheriff, assistant manager to the appellants' chartering agents, who stated that, at the date of the charter, the international situation was considerably overclouded and the possibility of war was in the minds of his company. My Lords, both these facts are true, but it still has to be determined whether they are enough to establish that at that time the embargo could reasonably have been foreseen. It is true that, when the bills of lading were issued, Czechoslovakia had been seized and an undertaking given to protect Poland, but no treaty had yet been made between Germany and Russia. These circumstances have to be balanced one against the other, and I am not sure that, without the advantage of your Lordships' opinions, I should have come to the conclusion that a shipowner ought to have foreseen that within the course of the contemplated voyage, if protracted, a war would be likely to occur or, if it did, that the carriage of goods to the stipulated range of ports, and in particular to Karlshamn, would be prohibited. But your Lordships think that such an event should have been anticipated and I am not prepared to differ. On this finding, whilst in my opinion *The Malcolm Baxter Jr.* (2) was rightly decided according to the law of this country, it can be distinguished and its principles do not govern the case which your Lordships are considering. In reaching this

(1) 31 Ll. L. Rep. 200, 202; 277 U. S. 323, 334.

(2) 31 Ll. L. Rep. 200; 277 U. S. 323.

conclusion I take into account the distinction drawn by the Lord President between such a case and that of a vessel struck by lightning or running into a typhoon which she would have avoided had she sailed with reasonable dispatch. Either may happen as much at one place or time as another, whereas delay, at a time when war is likely to occur, gives more opportunity for its incidence than a speedy and proper dispatch would give. Where, however, the basis of liability is delay, it is, as I think, the reasonable anticipation which matters and, but for the finding that the appellants ought to have foreseen the likelihood of war breaking out, I should have thought that your Lordships' decision would rightly have been given in favour of the appellants.

It was contended, indeed, on behalf of the respondents that the delay was the result of the appellants' breach of contract in providing an unseaworthy ship and that for the consequences of that breach of contract they are liable, whether they could have anticipated them or not, and in support of this argument *The Wilhelm* (1) was cited. In that case a ship was chartered to proceed to Archangel and there load a part cargo of tar. After she was loaded and ought to have had her provisions on board she had an opportunity of sailing, but owing to the negligence of the master in not having provisions on board she missed that opportunity and then was frozen in. In these circumstances Dr. Lushington, sitting in the Court of Admiralty held the shipowners liable for their breach of contract in failing to convey the cargo to its port of delivery with all expedition and to make good to the owners of the cargo the damage which accrued. If this decision is to be given its fullest significance, the respondents' contention would be established, but I think it must be qualified to some extent and is only justified upon the ground that the shipowner ought reasonably to have contemplated that at the relevant time, viz., October 8, the vessel was in danger of being frozen in, unless she sailed promptly. On the other hand, in *Associated Portland Cement Manufacturers* (1900), *Ld.* v. *Houlder Brothers & Co., Ld.* (2), where a ship was to be at Northfleet on May 25, but was still on a voyage from Hull on May 26 and on that date was torpedoed, Atkin J., as he then was, held the charterers entitled to recover any expenses resulting from her non-arrival on May 25 and 26, but that thereafter the loss of the ship rendered performance of the contract impossible and the shipowners

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(1) 14 L. T. 636.

(2) (1917) 86 L. J. (K. B.) 1495.

H. L. (Sc.).
1948
Monarch Steamship Co., Ld.
v.
Karlshamns Oljefabriker (A/B).
Lord Porter.

liable for no further loss. These two cases can, I think, only be made consistent on the ground that in the first the shipowners ought reasonably to have foreseen the likelihood of the ship being frozen in if she delayed, whereas in the second there was no more reason to anticipate her loss by torpedo at one moment rather than at another, and the same principle seems to me to lie at the back of that class of decision which says that delay does not expose goods to any greater risk of being carried away by a flood or struck by lightning than if they had been carried with dispatch. I conclude therefore that the diversion to Glasgow, brought about through the delay in carrying out the contract of carriage in the present case, is attributable to the default of the owners of the ship, because in the conditions existing in April, 1939, they ought to have foreseen that war might shortly break out and that any prolongation of the voyage might cause the loss of or diversion of the ship.

Even, however, if the present case is distinguishable on its facts from *The Malcolm Baxter Jr.* (1) and the appellants are liable for such loss as is legally recoverable, it yet has to be determined whether the respondents are entitled to recover the damages claimed, or indeed any damages, as a result of the appellants' breach of contract. In other words, did the transhipment costs naturally and directly flow from the initial unseaworthiness? The appellants contend that those costs were neither directly nor naturally caused by the unseaworthiness of the vessel, but were the result of circumstances peculiar to the pursuers and not communicated to the appellants, who never undertook the contract on the terms that they should be liable for damages of that kind. If the claim had been for loss of profit in the respondents' business, I should think the appellants' contention sound. *Hadley* v. *Baxendale* (2), *Horne* v. *Midland Ry. Co.* (3) and *British Columbia and Vancouver's Island Spar, Lumber and Saw Mill Co., Ld.* v. *Nettleship* (4), would apply and the damages would be too remote. But the claim is not for such damages but for transhipment costs, and the argument turned on the right of a shipper to recover such costs in a case where he was left to complete the contract of carriage at his own expense.

On behalf of the appellants it was said that the contract was made with Mitsui and continued to be with them, upon the terms of the contract contained in the charterparty, until the bills of lading were transferred to the pursuers two days after the ship's arrival at Glasgow. The appellants, when they entered into the contract of carriage, knew only Mitsui, who were merchants buying for re-sale and delivery at one of a range of ports. If the carrying ship failed to deliver at the nominated port, the only damages sustained by the merchants were such sum as they lost, which would normally be measured by the difference between the price obtainable for the goods at the named port and that receivable at the place where they were actually delivered. In the present case there was no loss, since the price at which the British Government would have requisitioned at Glasgow was 8*l.* 17*s.* 6*d.* a ton, i.e., 11*s.* 3*d.* more than the sale price ; and it had not been proved that more could have been obtained in the open market at Karlshamn. Mitsui, it was said, could not increase those damages by transferring the bills of lading to the respondents after the ship's arrival at Glasgow. It was pointed out further that before the Bills of Lading Act, 1855, Mitsui could have transferred the property in the goods, but not the benefit of the contract of carriage. After the passing of that Act it was said that they could transfer any right which they themselves possessed under it but nothing more, and, as they could recover no damages, no more could their assignees. Moreover, the assignees themselves could not even obtain damages against Mitsui, who had fulfilled their c.i.f. contract by furnishing valid bills of lading, the contractual insurance policies and the appropriate invoices. For the purpose of testing this argument it must, of course, be assumed that the appellants had broken their contract by failing to deliver the goods at Karlshamn, and it must then be asked whether Mitsui or the respondents were obliged to accept the beans in some other quarter of the globe, where they did not want them, without any right to recover damages, provided they could sell them there at a price as high as they could obtain at the contractual port. I cannot think that they were obliged to accept any such substituted performance. They appear to me to have had the right to require the goods to be delivered at the place stipulated, and if the shipowner failed to carry out his bargain to deliver there, the direct and natural consequence is that the merchant should arrange for the carriage forward and charge the shipowner with the reasonable cost of doing so. Nor do I think it improves the appellants' position to say that it is the respondents' duty to minimize or nullify his damages by selling elsewhere. He is entitled to have his contract fulfilled in the manner stipulated and is under no obligation to accept some undesired method of performance. Some support is given to this view by the decision in *Connal, Cotton & Co.* v. *Fisher Renwick & Co.* (1), though in that case the extra cost of purchasing at the port of delivery in fact exceeded the expense of transhipment. If this view be right, the respondents were entitled to recover the expense of forwarding the goods in fulfilment of their contract, whether that contract was contained in the charterparty or in the bills of lading and, under the Bills of Lading Act, could transfer that right to the assignee of the latter documents.

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(1) 31 Ll. L. Rep. 200; 277 U. S. 323.

(2) 9 Ex. 341.

(3) L. R. 8 C. P. 131.

(4) L. R. 3 C. P. 499.

Having regard to this view it is unnecessary to discuss the other consideration put forward in the course of argument that whatever the exact legal position between Mitsui and the respondents, the latter were under no obligation to stand on their exact legal rights, but as honourable merchants were entitled to fulfil their contract and to be indemnified by shipowners who had not fulfilled theirs. It will be observed that in this conclusion I am accepting the position maintained by the appellants that the indorser of a bill of lading cannot give his indorsee more rights than he himself possesses, and treating the matter as if Mitsui, by assigning the bills of lading to the respondents, had only transferred such rights as they themselves possessed to the respondents. To some extent this attitude involves acceptance of the view that the taking of a bill of lading by the charterer of a ship confers no immediate rights upon him under the bill of lading, but gives him an incohate right, by indorsing the bill of lading to a third party, to make it an effective document from the beginning of the voyage so as to enable the indorsee to sue upon it for any breaches of contract committed during the voyage but before its transfer to him: "As if," it was put in the course of argument, "the contract "contained in the bill of lading had at the time of shipment "been made with himself." If this be the true view it does not matter that, at the time the bill of lading was transferred to the respondents, carriage to and delivery at Karlshamn by the chartered ship had become illegal. If they took over the contract of carriage as from the date of shipment they had a right to have the goods shipped to Karlshamn, and it was immaterial that at a later date delivery there became impossible provided, of course, that that inability was caused by the

(1) 10 R. 824.

appellants' breach of contract. But it is said to give such damages either to Mitsui or to the respondents is to give damages for delay in delivery—a remedy which is not given in the case of carriage of goods by sea. No doubt expressions of opinions to that effect are to be found, perhaps more frequently in the days of sailing ships when prolonged delay was to be expected, but it never was a rule of law—merely a working practice answering to the circumstances of the time and subject to the consideration that the contract must be reasonably performed. In the present case the result of the delay was to deprive the shipper and his indorsee of the goods at Karlshamn. Of course, if they could replace them by buying other goods there, it was their duty to diminish the damages by doing so. But they could not do so since no soya beans were procurable at Karlshamn and, in default, the only way of placing themselves in the same position as if the contract had been performed was to engage transport to carry the beans to that port. Accepting then the view that the appellants ought to have foreseen the likelihood of war occurring and of an embargo being imposed, I should find them liable to pay the damages claimed and would dismiss the appeal.

LORD WRIGHT. My Lords, the cargo shipped at Rashin consisted of 8,200 tons of beans. The shippers, Mitsui, sold these beans under a c.i.f. contract dated London April 21, 1939, the buyers being the Scandinavian Co-operative Wholesale Society, who acted as agents for the respondents. The bills of lading were not indorsed to it until October 23, 1939, when they took up the bills of lading and paid the price. Thereupon the respondents acquired the property in the goods and the rights under the contract contained in the bills of lading in virtue of the Bills of Lading Act, 1855. They bring this action accordingly.

The voyage was extraordinarily protracted owing to the unseaworthiness of the vessel. The fact of unseaworthiness was established after an elaborate and prolonged trial before Lord Sorn, the Lord Ordinary, and was admitted before the Inner House and is now admitted before your Lordships. It was not suggested that the unseaworthiness was latent or excused by any term of the contract. Lord Sorn found (1) that, "considering the whole evidence it is impossible, to my "mind, to resist the inference that by the time the *British*

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(1) (1946) 79 Ll. L. Rep. 385, 388.

H. L. (Sc.).

1948

MONARCH STEAMSHIP CO., LD. *v.* KARLSHAMNS OLJEFABRIKER (A/B).

Lord Wright.

" *Monarch* had got to Rashin her boiler tubes were so worn " and deteriorated that she was in no fit state to enter on the " contemplated voyage." Later in his judgment, he said (1): " I am satisfied that by the time the vessel reached Rashin " her tubes as a whole were in a defective condition and that, " in addition, the flaw which permitted sea water to find its " way into the boilers was then in existence and that, in " consequence of these defects, the ship was unseaworthy." There were also questions about the Japanese coal with which the vessel was mainly bunkered when she left Rashin. The appellants were fully aware of the risk connected with the boilers, because there had been a great deal of trouble under the previous charter. No doubt the risk was appreciated, but it was hoped by the appellants that it would not materialize.

At the conclusion of the arguments Sir William McNair admitted that the appellants had broken their contract, but claimed that the damages were only nominal. I agree, however, with the unanimous decision of all the judges below that the claim for the damages is justified. It in truth gives effect to the broad general rule of the law of damages that a party injured by the other party's breach of contract is entitled to such money compensation as will put him in the position in which he would have been but for the breach. In that respect this case is singularly clear, because the contract entitled the respondents to have the beans delivered at Karlshamn and the damages claimed and awarded represent simply the sum necessary to effect that result, namely the cost of transhipment from Glasgow to Karlshamn. The respondents were fortunate in being neutrals, and in being able to charter neutral tonnage and obtaining from the British Government permits to carry the beans from this country to Sweden. What the respondents wanted was the consignment of beans; their value either in Glasgow or Sweden where no beans were on the market, would have been a poor consolation. But as transhipment could be effected, the extra cost incurred for transhipment was the proper subject of monetary compensation. The respondents have made no claim for interference with their business. The damages awarded are not special or remote but are the damages naturally and directly resulting from the appellants' breach of contract within the rules of *Hadley* v. *Baxendale* (2). Alderson B. giving the judgment of the court said: " We think the proper rule in such a case as

(1) 79 Ll. L. Rep. 385, 390.

(2) 9 Ex. 341, 354.

"the present is this: where two parties have made a contract "which one of them has broken, the damages which the other "party ought to receive in respect of such breach of contract "should be such as may fairly and reasonably be considered "either arising naturally, i.e., according to the usual course of "things, from such breach of contract itself, or such as may "reasonably be supposed to have been in the contemplation "of both parties, at the time they made the contract, as the "probable result of the breach of it." Alderson B. then pointed out (1) that if the special circumstances of the particular case were wholly unknown to the other party, he could at most be only supposed to contemplate the amount of injury which would arise generally, and in the great number of cases not affected by any special circumstances. This passage is quoted in full by Viscount Sankey L.C., in *Banco de Portugal* v. *Waterlow & Sons, Ld.* (2): Viscount Sankey added (3) a clear and useful statement by Lord Blackburn in *Livingstone* v. *Rawyards Coal Co.* (4): "Where any injury is to be com-"pensated by damages, in settling the sum of money to be "given for reparation of damages you should as nearly as "possible get at that sum of money which will put the party "who has been injured, or who has suffered, in the same "position as he would have been in if he had not sustained "the wrong for which he is now getting his compensation or "reparation." The ruling of Alderson B. has consistently been followed: the only difficulty, as Viscount Sankey observes (3) has been in applying it. The distinction there drawn is between damages arising naturally (which means in the normal course of things), and cases where there were special and extraordinary circumstances beyond the reasonable prevision of the parties: in the latter event it is laid down that the special facts must be communicated by and between the parties. The distinction between these types is usually described in English law as that between general and special damages; the latter are such that if they are not communicated it would not be fair or reasonable to hold the defendant responsible for losses which he could not be taken to contemplate as likely to result from his breach of contract. I am not here concerned to examine the differences or similarities between this rule and the corresponding rules which are adopted in claims in tort. To apply this to the facts of the present

(1) 9 Ex. 341, 355.
(2) [1932] A. C. 452, 474.
(3) Ibid. 475.
(4) (1880) 5 App. Cas. 25, 39.

case, it appears that if the respondents had been claiming special and peculiar loss due to interference with their business, such damages might prima facie be too remote and not proper to be recovered in the absence of notice when the contract was entered into. The court will, however, assume that the parties as business men have all reasonable acquaintance with the ordinary course of business. But, as the respondents are claiming only for their loss directly due to the failure of the appellants to fulfil their promise to deliver the beans at Karlshamn, their claim is not based on any extraordinary or peculiar matter, but is only what might be claimed by any party which suffered a similar injury in the general circumstances of that business and at that time and place. There was indeed in 1939 the general fear that there might be war. Munich, the Sudetenland, the invasion by Germany of Czechoslovakia, the difficulty about the Polish Corridor, were matters of common knowledge. Indeed, Mr. Sheriff, the responsible assistant manager of the appellants' chartering agents, in his evidence, said that in April, 1939 (that is, when the charter was negotiated) the possibility of war was in their minds, and he added that there was a special war risks clause added to the charter in a slip attached. If the possibility of war was in the thoughts of the appellants, as it must have been, because shipowners have to keep in mind the international situation, the same must be true of the respondents, a concern dealing in large international purchases of raw material. The possibility must have been in the minds of both parties, even apart from the war clause, which is a printed form in frequent use during unsettled times: there was no need for one party to say to the other: "Be careful to hurry on the voyage as "much as possible, because, if war breaks out before the vessel "gets to Karlshamn, the British Government will almost "certainly direct her under the war clause: the Channel, the "North Sea, or the Baltic will of course not be healthy places "for a British vessel." Business is not conducted in that way. Experienced business men would know what the contract provided and what the actual risks were. It was not likely that the appellants' representatives would say: "We have "been having trouble with her boilers but we will hope for the "best and in any case there is an ample margin of time." But all I am at the moment emphasizing is that risks consequent on the prolongation of the voyage must have been in contemplation both by the shipowners and the shippers. The question whether damage is remote or "natural" and direct, can in general only be decided on a review of the circumstances of each special case. Remoteness of damage is in truth a question of fact, as Viscount Haldane L.C. describes it in the *British Westinghouse Electric & Manufacturing Co., Ld.* v. *Underground Electric Rys. Company of London, Ld.* (1). He says with reference to questions as to damages: "In some "of the cases there are expressions as to the principles govern-"ing the measure of general damages which at first sight seem "difficult to harmonize. The apparent discrepancies are, "however, mainly due to the varying nature of the particular "questions submitted for decision. The quantum of damage "is a question of fact, and the only guidance the law can give is "to lay down general principles which afford at times but "scanty assistance in dealing with particular cases. The "judges who give guidance to juries in these cases have "necessarily to look at their special character, and to mould, "for the purposes of different kinds of claim, the expression "of the general principles which apply to them, and this is "apt to give rise to an appearance of ambiguity." He then states the broad principle of compensation to which I have already referred and adds a reference to the ancillary duty of minimizing damage. It is I, imagine, with language like that of Viscount Haldane L.C. in his view that Lord Atkin (then Atkin L.J.) in *The Susquehanna* (2) says: "This is one of "those cases dealing with damages which, in my experience' "I have found to be a branch of the law on which one is less "guided by authority laying down definite principles than on "almost any other matter that one can consider." Viscount Haldane L.C. in the passage just cited, had to deal with a case where, as he said (3), it was necessary "to balance loss and "gain," and no simple solution was possible. Again, in *Liesbosch (Owners)* v. *Edison (Owners)* (4), this House made some observations on the measure of damages, which are of general import. The case was one of tort. The question there was what was the proper sum to award by way of compensation for the loss of a dredger. It was said (5): "Many, varied and "complex are the types of vessels and the modes of employ-"ment in which their owners may use them. Hence the "difficulties constantly felt in defining rules as to the measure

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(1) [1912] A. C. 673, 688, 689.
(2) [1925] P. 196, 210.
(3) [1912] A. C. 673, 691.
(4) [1933] A. C. 449.
(5) Ibid. 464, 465.

H. L. (Sc.).

1948

MONARCH STEAMSHIP CO., LD. *v.* KARLSHAMNS OLJEFABRIKER (A/B).

Lord Wright.

"of damages. I think it impossible to lay down any universal "formula." Earlier in the judgment it was said (1): "The "dominant rule of law is the principle of restitutio in integrum, "and subsidiary rules can only be justified if they give effect "to that rule." In *Liesbosch* (*Owners*) v. *Edison* (*Owners*) (2) it was held that loss due to the party's impecuniosity was too remote and therefore to be neglected in the calculation of damages: it was special loss due to his financial position. A different conclusion was arrived at in *Muhammad Issa el Sheikh Ahwad* v. *Ali* (3), where damages consequent on impecuniosity were held not too remote, because, as I understand, the loss was such as might reasonably be expected to be in the contemplation of the parties as likely to flow from breach of the obligation undertaken (see the judgment of the Judicial Committee delivered by Lord Uthwatt (4).) The difference in result did not depend on the differences (if any) between contract and tort in this connexion. The "reasonable "contemplation" as to damages is what the court attributes to the parties. The breach itself is, of course, objective. The constant necessity of picking out from a plurality of items that which is material is also remarked upon in the judgment in *Liesbosch* (*Owners*) v. *Edison* (*Owners*) (2).

These general statements could be multiplied but the question in a case like the present must always be what reasonable business men must be taken to have contemplated as the natural or probable result if the contract was broken. As reasonable business men each must be taken to understand the ordinary practices and exigencies of the other's trade or business. That need not generally be the subject of special discussion or communication. The future possibility of a breach must be both contingent and hypothetical and may take unexpected forms. Thus, in the *Banco de Portugal* case (5) the breach of contract was of a type not reasonably to be anticipated and the consequences were complex and indirect, at least in the sense that they naturally involved action by other parties, but they were unanimously held by the House to be subjects of monetary compensation to make good the loss. I cannot find that any point was raised as to the necessity of communicating any special circumstances. Both parties were tacitly taken to be acquainted sufficiently with the general business position. The same is true in many cases of complicated consequences flowing from an unanticipated breach of contract, but the damages are not treated either as special or remote if they flow from the normal business position of the parties which the court assumes must be reasonably known to them. It would not be helpful to cite the familiar authorities which are numerous but depend primarily upon the facts of each case. Even in the very simple case of breach by a buyer of his contract to accept and pay for goods, the Sale of Goods Act, 1893, s. 50, sub-s. 2, is content to enact that : "The "measure of damages is the estimated loss directly and "naturally resulting, in the ordinary course of events, from "the buyer's breach of contract." When in sub-s. 3 it gives a more specific rule, it qualifies it by the words "prima facie." But in the present case the compensation claimed is what is the most obvious and natural. The cost of transhipment is the most natural form of reparation. It cannot be said to involve extraordinary or uncontemplated hardship as the damages claimed were said to do in cases like *British Columbia and Vancouver Island Spar, Lumber and Saw-Mills Co., Ld.* v. *Nettleship* (1) and *Horne* v. *Midland Ry. Co.* (2), which were relied upon by counsel for the appellants. I may refer to the authority of the Scotch case of *Connal, Cotton & Co.* v. *Fisher Renwick & Co.* (3), where the cost of transhipment was allowed as the proper measure of damages for failure to deliver under a contract of sea carriage at the agreed destination.

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(1) [1933] A. C. 449, 463.

(2) Ibid. 449.

(3) [1947] A. C. 414.

(4) Ibid. 427.

(5) [1932] A. C. 452.

But a question of remoteness in another connexion and in another sense has been raised. That is in reference to remoteness in the sense of causal connexion. The claim here is for damages for unseaworthiness, which, it is said, caused delay on the voyage, and the delay exposed the vessel to being diverted by order of the Admiralty. This, it was said, may properly be regarded as coming within the exception of restraints of princes, though, indeed, it was for the benefit of the appellants, because, if it could be invoked by the appellants, it gave them a right to the bill of lading freight in full as on performance of the contract by a delivery short of the bill of lading destination. In my opinion, this objection, which would treat restraints of princes as the immediate or dominant cause of the delay, fails. The Lord President relied on the decision of this House in *Smith, Hogg & Co., Ld.* v. *Black Sea and Baltic*

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(1) L. R. 3 C. P. 499.
(2) L. R. 8 C. P. 131.
(3) 10 R. 824.

General Insurance Co., Ld. (1), in which case the loss of a vessel which occurred through the negligence of the master operating on conditions of unseaworthiness existing since the commencement of the voyage, was held to be caused by breach of the warranty of seaworthiness and recoverable accordingly. There was an exception of negligence: negligence could be regarded as a co-operating cause, no different in principle from any physical and tangible cause. As this House, however, said (2), no distinction can be drawn between cases where the negligent conduct of the master is a cause and cases where any other cause such as perils of the sea is a co-operating cause. "A negligent act is as much a co-operating cause, if it is a cause "at all, as an act which is not negligent." What was being there emphasized was that a voluntary act (negligent or not) of a human agent is not generally an independent or new cause for this purpose which breaks the chain of causation, as it is called, so as to exclude from consideration the causal effect of the unseaworthiness. It is well established that unseaworthiness, if it is to be a relevant factor of liability, must be "a cause" of the damage or loss. That is necessary because unseaworthiness might take many different forms in the same vessel, so that before any one form can be relied upon, it must be a cause of damage; for instance, the failure to carry a proper medical chest, if it is a breach of the warranty, might have no relevance to the loss of a vessel by perils of the seas. But a different result follows if the breach is a cause of the loss. Thus, in *Smith, Hogg & Co., Ld.* v. *Black Sea and Baltic General Insurance Co., Ld.* (1), the unseaworthiness created in the vessel instability which, combined with negligence of the master, caused the loss. There was no new law laid down in that case. From one point of view, unseaworthiness must generally, perhaps always, in a sense be a "remote" cause. To satisfy the definition of unseaworthiness it must exist at the commencement of the voyage. It must, however, still be in effective operation at the time of the casualty if it is to be a cause of the casualty, and from its very nature it must always, or almost always, operate by means of and along with the specific and immediate peril. That is because the essence of unseaworthiness as a cause of loss or damage is that the unseaworthy ship is unfit to meet the peril. In other words, the vessel would not have suffered the loss or injury if she had been seaworthy. A ship may be lost not simply by a peril of

(1) [1940] A. C. 997.

(2) Ibid. 1005.

the sea but also by and because of the failure to fulfil the warranty. Thus, for instance, in the *Standard Oil Company of New York* v. *Clan Line Steamers, Ld.* (1), the vessel capsized because the master, not being instructed by his owners as to the peculiarities of a turret ship, so handled her that she capsized. That loss was immediately due to perils of the sea which overwhelmed her when she capsized, liability for which was excepted, but the dominant cause was her unseaworthiness in that her master, though otherwise efficient, was inefficient in not being aware of the special danger. In general, all the authorities are in agreement in this respect and embody the same rule. The shipowner, of course, under the familiar general rule, is debarred by his breach of duty from relying on the specific exception. Though he would not be liable for the consequences caused by the specific excepted peril or the accident alone if he were not in default, and though the unseaworthiness existing at the commencemet of the voyage might not be operative or known until the time when the accident occurs, yet then the breach of the warranty operates directly as a cause and, indeed, a dominant cause. Causation in law does not depend on remoteness or immediacy in time. So it was held in *Leyland Shipping Co., Ld.* v. *Norwich Union Fire Insurance Society, Ld.* (2). But unseaworthiness as a cause, operates immediately whenever it comes into effect; it has until then only been dormant. The maxim causa proxima non remota spectatur is either meaningless or misleading until " remota " and " proxima " are defined. Thus unseaworthiness as a cause cannot from its very nature operate by itself; it needs the " peril " in order to evince that the vessel or some part or quality of it, is less fit than it should have been and would have been if it had been seaworthy, and hence the casualty ensues. A fitter ship would have passed through the peril unscathed. In this way unseaworthiness is a decisive cause or as it is called a dominant cause. If it is not expressly excepted, the shipowner cannot excuse himself by any specific exception for a loss for which he is himself responsible, because he is responsible for unseaworthiness.

There is, however, in this case a contention of a more general nature, which is that the delay which resulted from the defective boilers did not in any legal sense cause the diversion of the vessel. It is said that the relation of cause and effect cannot be postulated here between the unseaworthiness and the restraints

(1) [1924] A. C. 100.

(2) [1918] A. C. 350.

H. L. (Sc.).

1948

Monarch Steamship Co., Ld. v. Karlshamns Olje-fabriker (A/B).

Lord Wright.

of princes or the delay. As to such a contention it may be said at once that all the judges below have rejected it. As I have pointed out, if the vessel had arrived at Karlshamn in July she could not have been exposed to the risk of the restraint of princes, but she did not arrive until October, and thereby (in the historic phrase) "missed the bus." If a man is too late to catch a train, because his car broke down on the way to the station, we should all naturally say, that he lost the train because of the car breaking down. We recognize that the two things or events are causally connected. Causation is a mental concept, generally based on inference or induction from uniformity of sequence as between two events that there is a causal connexion between them. This is the customary result of an education which starts with our earliest experience: the burnt child dreads the fire. I am not entering upon or discussing any theory of causation. Those interested in philosophy will find modern philosophic views on causation explained in Russell's History of Western Philosophy in the chapter on Hume, Book 3, ch. xvii. The common law however is not concerned with philosophic speculation, but is only concerned with ordinary everyday life and thoughts and expressions, and would not hesitate to think and say that, because it caused the delay, unseaworthiness caused the Admiralty order diverting the vessel. I think the common law would be right in picking out unseaworthiness from the whole complex of circumstances as the dominant cause. I have assumed that the bills of lading and charterparty exceptions which are expressed to be conditional on the vessel being seaworthy, use "seaworthy" in the sense that the breach of warranty was a breach which caused the loss. This is assumed in *Paterson Steamships, Ld.* v. *Canadian Co-operative Wheat Producers, Ld.* (1), in respect of a similar provision in the Water Carriage of Canada Act, and in other cases.

Before I leave the various problems or difficulties argued or suggested in the appeal, I should notice some others: (1.) It is suggested that *Smith, Hogg & Co., Ld.* v. *Black Sea and Baltic General Insurance Co., Ld.* (2) only refers to physical causes and physical defects and physical damage. I can see no ground for this in principle or authority or in the facts of this case. The bad state of the boilers was a physical cause which reduced the vessel's speed from 9 to 5 knots, and necessitated the deviations, and I think as a matter of law that a vessel

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(1) [1934] A. C. 539.

(2) [1940] A. C. 997.

H. L. (Sc.).

1948

MONARCH STEAMSHIP. CO., LD.
v.
KARLSHAMNS OLJEFABRIKER (A/B).

Lord Wright.

may be unseaworthy in particular circumstances without any structural or mechanical defect, for instance, if she is carrying contraband or false papers without the consent of the shippers, and may, quoad hoc, be subject to delay or even condemnation without any physical interference except such as the restraint implies. The principle of *Smith, Hogg & Co., Ld.* v. *Black Sea and Baltic General Insurance Co., Ld.* (1) is wide enough to cover such a case. *Dunn* v. *Bucknall Brothers* (2) was an illustration of that character, and in principle supports this view. (2.) It is said that the respondents, when they became assignees of the bills of lading, got only such rights as were then alive, and the only rights then alive were for delivery at Glasgow. I think it enough to refer to the Bills of Lading Act and the long-established practice of dealing with the bills of lading of seaborne cargoes. The rights transferred under the bills of lading were all such as might flow from the contract ab initio and the various supervening events. (3.) There is also the contention that the action must fail because the contract was frustrated and that the claim for damages must therefore fail. There are, in my judgment, many fatal objections to this contention. I think it is enough to point out that the Admiralty order (which is the frustrating event) is a restraint of princes expressly dealt with by the contractual exception, which sufficiently provides for the peril and further does not help the appellants. because it is excluded by the breach of warranty which brings it into operation. Thus, the frustration was caused by matters for which the appellants were responsible. In Lord Sumner's words, "the principle of " frustration of an adventure assumes that the frustration arises " without blame or fault on either side. Reliance cannot be " placed on a self-induced frustration." So the principle was stated in *Bank Line, Ld.* v. *Arthur Capel & Co.* (3). The principle was applied in *Maritime National Fish, Ld.* v. *Ocean Trawlers, Ld.* (4). I think it is enough to say that it applies here. (4.) I think a similar course of reasoning disposes of the contention that the appellants can escape the consequences of their breach of contract by saying that it would have been illegal for them to proceed to Karlshamn after the Admiralty order. It would certainly not have been possible and it would certainly not have been allowed by the Admiralty. The appellants would rather have welcomed than resisted the order.

(1) [1940] A. C. 997.
(2) [1902] 2 K. B. 614.
(3) [1919] A. C. 435, 452.
(4) [1935] A. C. 524.

But I think the same answer applies here according to English law as in regard to the contention of frustration. I mean that the illegality was due to the appellants' own act and is not available as a defence to the injured party's claim. (5.) I agree with the court below that nothing done at Glasgow by the respondents constituted a waiver of their right to claim damages for the breaking of the contract.

I might, however, notice, before I conclude, the arguments based upon the authority in the United States Supreme Court cited by the appellants. The case is *The Malcolm Baxter Jr.* (1), entitled in the Supreme Court the *Republic of France* v. *French overseas Corporation.* The Lord President, in his outstanding judgment, has put his finger on one decisive difference from the present case, namely, that there the law forbidding United States sailing ships from sailing across the Atlantic was something new, unprecedented and not capable of prevision as a possible consequence of the delay consequent on the breach of warranty. That is certainly a sufficient distinction, but the complex of facts in that case was so completely dissimilar from those in the present case as to prevent the authority from being any guide to me. The United States case is noted by Williston in his encyclopædic work on Contracts (revised edition), ss. 1096, 1938 and 1951, but the learned author does not comment on it in any detail. He cites it in his sections on illegality, and also in connexion with the liabilities of carriers by land, where their delay has brought the goods into the scope of an Act of God, such as floods, tempests and the like, which could not be foreseen as likely to operate on the adventure, as a consequence of delay. The Lord President has dealt with this aspect and I do not wish to add to what he has said. The other peculiarity of the decision is that, as I understand, the court held that when eventually at Havana the vessel was made seaworthy and the general law prohibited her from crossing the Atlantic, the whole position could be considered without reference to what happened before that stage, and it could be said that the only cause, why she could not then proceed was the United States law and not the unseaworthiness. I can only regard that as a particular conclusion based on all the special facts of the case. I cannot, therefore, find any guidance for the decision in this appeal. Decisions of the United States courts, even the Supreme Court are not of coercive but only of persuasive force in the courts of this country. It is certainly desirable that as far as possible there should be uniformity between the law merchant as administered in the United States and in Britain. The origin and foundation of the law in both countries are the same. But as time goes on and cases arise, individual differences emerge and accumulate. Even the general principles of the law of carriage by sea do not receive identical expression or development in the courts of the two countries. That same phenomenon may be observed even in comparing the laws of the different States and the federal courts. Instances must be familiar to lawyers. There is a further difficulty in that the British lawyer cannot be familiar with the American decisions. He has not access to the reports; and, indeed, the American reports have reached such dimensions that they are quite beyond the capacity of a British lawyer. Even the American lawyer has to avail himself of the extraordinarily efficient and comprehensive system of indexing and reference which has been developed. It is the great development of case law on the other side of the Atlantic, coupled with a similar though lesser development on this side, which has discouraged the practice, at best rare, followed up to the middle decades of last century by British judges to cite American cases. I am not disparaging or discouraging the fullest possible interchange and reciprocity between American and British lawyers, but I cannot help recognizing how difficult and perhaps dangerous it may be to ask a British judge to rely on a particular United States decision torn from its setting in the totality of United States case law and statutes, simply because of some partial similarity in the facts.

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(1) 31 Ll. L. Rep. 200; 277 U. S. 323.

I would dismiss the appeal.

LORD UTHWATT. My Lords, I have had the advantage of reading in print and considering the opinions of the noble and learned Lord on the woolsack and of my noble and learned friend LORD WRIGHT. I agree with their conclusion and I intervene only to say that I do not share the doubt expressed by the noble and learned Lord on the woolsack on the question whether the appellants, on April 4, 1939, should reasonably have foreseen the likelihood of the imposition of an embargo affecting the carriage of goods to the range of ports specified in the charterparty. To my mind, the situation in Europe at that date was such that a reasonable shipowner contemplating a voyage from Rashin to that range of ports would regard the chance of war, not as a possibility of academic interest to the venture, but as furnishing matter which commercially ought to be taken into account. If war happened, the embargo to which I have referred would, in his view, be an almost inevitable consequence. I would dismiss the appeal.

LORD DU PARCQ. My Lords, it is unnecessary for me to address your Lordships on all the points which were argued at the Bar, and I will confine myself to the question of damages. I may be taken to concur in the opinion of my noble and learned friend on the woolsack on all those matters with which I do not specifically deal.

I do not doubt the wisdom of the judges who, in *Hadley* v. *Baxendale* (1) and the many later cases which interpreted or explained that classic decision, have laid down rules or principles for the guidance of those whose duty it is, as judges or jurymen, to assess damages. When those rules or principles are applied, however, it is essential to remember what my noble and learned friend Lord Wright, and Lord Haldane in the passage cited by him, have emphasized, that in the end what has to be decided is a question of fact, and therefore a question proper for a jury. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality, and not too rigidly applied. It was necessary to lay down principles lest juries should be persuaded to do injustice by imposing an undue, or perhaps an inadequate, liability on a defendant. The court must be careful, however, to see that the principles laid down are never so narrowly interpreted as to prevent a jury, or judge of fact, from doing justice between the parties. So to use them would be to misuse them. It is interesting to find a judge of the experience of Wilde B., six years after *Hadley* v. *Baxendale* (1) was decided, expressing a doubt which may well have been widely shared. " For my own part," he said, " I think that, " although an excellent attempt was made in *Hadley* v. " *Baxendale* (1) to lay down a rule on the subject, it will be " found that the rule is not capable of meeting all cases ; " and when the matter comes to be further considered, it will " probably turn out that there is no such thing as a rule, " as to the legal measure of damages, applicable in all cases." See *Gee* v. *Lancashire and Yorkshire Ry. Co.* (2). The observations of Lord Haldane to which reference has been made show the wisdom of this forecast.

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(1) 9 Ex. 341.

(2) (1860) 6 H. & N. 211, 221.

My Lords, what I have said is not, I think, without relevance to the matter in hand. If Sir William McNair's argument were right, a judge would have had to direct a jury in the present case that they must award no more than nominal damages. Any jury of business men would, I believe, have received such a direction with dismay, and acted upon it with reluctance. It would, indeed, as it seems to me, result in manifest injustice. I may express my own opinion by saying that if a jury, directed in the terms in which the Lord President's opinion shows us that he would have directed them, had awarded the respondents the sum of 21,634*l.* as damages, there would have been no ground for setting aside or varying the verdict. It was pointed out by Blackburn J. in *Cory* v. *Thames Ironworks & Shipbuilding Co., Ld.* (1), that the rule which Alderson B. stated to be " the proper rule in such a case as the present " in *Hadley* v. *Baxendale* (2) consists of two alternatives. In my opinion the damages which have been awarded to the respondents come within the former of these alternatives, inasmuch as they are " such as may fairly and reasonably be considered as " arising . . . . according to the usual course of things, from " such breach of contract itself." Damage arises " according " to the usual course of things " if, in the circumstances existing at the date of the contract, both parties to it, supposing them to have considered the probable effects of a breach of the contract, with due regard to events which might reasonably be expected to occur, must be assumed as reasonable men to have foreseen such damage as at least a serious possibility. Unseaworthiness in itself may, if fortune is kind, occasion no damage to anybody, but, apart from other obvious dangers, it is very likely to cause delay. Delay may produce damage of many kinds, some of it predictable. If it be once granted that there was a real, and known, danger of war at the date of the contract, I understand that all your Lordships who heard the argument are agreed that the diversion of the ship which caused such grave loss to the respondents followed in the usual course of things from the delay and the unseaworthiness which caused it.

In order that the respondents might succeed in establishing their case, it was not necessary, in my opinion, that the parties to the contract should be shown to have contemplated the

(1) (1868) L. R. 3 Q. B. 181, 188. (2) 9 Ex. 341, 354.

outbreak of war as something certain and unavoidable. They are not to be supposed to have had the gift of prophecy. It is enough if they may reasonably be assumed to have contemplated a war, and the likelihood that it would lead to such an embargo as was in fact imposed, as a real danger which must be taken into account. I agree with my noble and learned friend Lord Wright that Mr. Sheriff's evidence, and the addition to the charter of the war risks clause, support the view that this assumption may fairly be made. I also agree that there was at the material date a general fear of war. Your Lordships are entitled, as were the Scottish courts, to take judicial notice of the facts of history, whether past or contemporaneous with ourselves. The Prime Minister's announcement on March 31, 1939, of the guarantee given to Poland was a definite landmark in the history of the world. It had been preceded on March 17 by the speech at Birmingham in which the Prime Minister had asked rhetorically whether the attack on Czechoslovakia was to be followed by another. It was natural to see in this question a reference to Poland, and the assurance which so swiftly followed that His Majesty's Government would " lend the Polish Government all support in their power " in the event of any action which clearly threatened Polish independence justified, and I think aroused, a general apprehension of war. Certainly men engaged in commerce, who are rightly sensitive even to hints of danger when their business interests are affected, can hardly have failed to be alive to the risk of war. Speaking of the guarantee to Poland, Mr. Winston Churchill has written : " No one who understood " the situation could doubt that it meant in all human " probability a major war in which we should be involved." (The Second World War, vol. I., p. 270.) I am not entitled to ask your Lordships to rely on this statement for its evidential value. I quote it as a comment which, speaking for myself, I would endorse, though with the qualification, that those who had to rely for their information on sources available to the general public at least had reasonable grounds for the belief that such a war was a serious possibility.

In my opinion the Lord Ordinary and the Inner House arrived at a proper conclusion and this appeal ought to be dismissed.

Lord Morton of Henryton. My Lords, I agree with the reasoning of the noble and learned Lord on the woolsack, and I only desire to say a few words on the matter as to which he expressed some doubt. Prior to the date of the charterparty, April 4, 1939, Germany had overrun Czechoslovakia. It was apparent then, if not before, that Hitler's pledged word was worthless and that he did not shrink from violence to achieve his ends. I think that any shipowner who was then contemplating a voyage from Rashin to one of a range of ports in Europe would feel that there was a grave risk of war breaking out in Europe, and an embargo being imposed, before the vessel reached her destination. In my view, the damage which was in fact suffered by the respondents was within the reasonable contemplation of the parties, and the appellants are liable to pay the damages claimed. I would dismiss the appeal.

Eustace Roskill for the appellants, submitted that they ought not to be ordered to pay the whole of the costs of printing the appendix to the case. In part I about 433 out of 528 pages related solely to the question of unseaworthiness, which was admitted before the House of Lords, and, in an opinion by the appellants' counsel, communicated to the respondents' solicitors, these pages were specified as proper to be omitted from the record. In a letter dated June 26, 1947, from the appellants' solicitors to the respondents' solicitors, it was stated: "We shall at the proper time protest against the "extra expense that will be incurred in printing such of the "evidence as the appellants' counsel have indicated as being "in their view unnecessary, owing to the fact that the question "of seaworthiness will not be argued before the House."

Donaldson for the respondents submitted that in a case in which there were engaged Scottish counsel who had to travel long distances to appear before the House of Lords, the hearing before the appellate committee would have been the proper time to raise the point or, if it were not then raised, some further intimation beyond the letter referred to should have been given that the matter was going to be raised subsequently.

THE HOUSE ordered that the appeal be dismissed and that the appellants do pay to the respondents the costs incurred by them other than those incurred by them by the inclusion in the appendix of oral evidence or documents relating solely to the issues of (1.) unseaworthiness or (2.) knowledge on the part of the respondents of such unseaworthiness and that the

H. L. (Sc.)
1948
MONARCH STEAMSHIP CO., LD. v. KARLSHAMNS OLJEFABRIKER (A/B).

respondents do pay to the appellants the costs incurred by them by the inclusion in the appendix of such documents or evidence as aforesaid.

Appeal dismissed.

Solicitors for appellants: *Botterell & Roche, for Beveridge, Sutherland & Smith W.S., Leith, and Montgomerie, Flemings, Fyfe, Maclean & Co., Glasgow.*

Solicitors for respondents: *Thomas Cooper & Co., for Boyd, Jameson & Young, W.S., Leith.*

J. C.*
1949
Feb. 14.

[PRIVY COUNCIL]

OIVIND LORENTZEN, AS DIRECTOR OF SHIPPING AND CURATOR OF THE ROYAL NORWEGIAN GOVERNMENT . APPELLANT;

AND

THE ALCOA RAMBLER (ALCOA STEAMSHIP COMPANY INC., OWNERS) . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Shipping—Collision—Harbour—Vessel, with curving course constantly changing under port helm, on starboard side of approaching vessel—Knowledge of situation not ascribable to approaching vessel—Not crossing vessels—Articles 19 *and* 21 *of Regulations for Preventing Collisions at Sea inapplicable—Issues of navigation and seamanship.*

Two steam vessels, the *R.* and the *N.*, each set out from their respective anchorages in a harbour crowded with shipping at about 9 a.m., *R.* from her position in the north-west of the harbour heading about S.S.E. magnetic for the harbour entrance, *N.*, according to the evidence of her pilot, was making a "curved "course" from her anchorage to the south on the west side to a point slightly north of east on the east side of the harbour. Both vessels were proceeding at about six knots, and the weather was fine and clear, with little or no wind. When the vessels first sighted each other through intervening shipping at about 9.14 a.m. at a distance of about 1,800 to 2,000 feet *R.*, a vessel carrying ammunition, which had *N.* on her starboard side, put her engines at slow ahead, stopped them a minute later, and a minute and a half later went full astern. At 9.18 a.m. she collided with the port side of *N.*, which had been constantly swinging to port on a " curving course " and had maintained her speed of about six knots until just before the collision, when she dropped both anchors and went astern and then ahead and astern to help her swing to starboard. On a claim by the owners of *N.* for damages occasioned by the collision :

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* *Present:* VISCOUNT SIMON, LORD WRIGHT, LORD ROCHE, LORD PORTER and LORD DU PARCQ, with CAPTAIN W. E. CRUMPLIN and CAPTAIN D. DUNN as NAUTICAL ASSESSORS.

Held, that wherever possible arts. 19 and 21 of the Regulations for Preventing Collisions at Sea, which have always to be read together with art. 27, ought to be applied and strictly enforced, though it may not always be possible in narrow and congested waters to apply the critical test for inferring that a vessel is on a course, namely, that her bearing does not alter. Here, *N.* was not keeping a steady course ; her head was altering to port, and a curved or curving course, constantly changing under port helm, would not have enabled the give-way vessel to decide how to act for her. Accordingly, of the two conditions that she should be on a course and that the give-way vessel should be able to ascertain that, neither was fulfilled. Articles 19 and 21 of the Collision Regulations were therefore inapplicable, and *N.* had not the status of a stand-on ship. There was no obvious or ordinary manœuvre by *N.* which would give knowledge to *R.* of the situation, so that quite apart from the difficulty inherent in a curved course, the case could not be held to be one of crossing vessels because the necessary knowledge of the situation could not be ascribed to *R.* In any event, *R.* took correct action at the proper moment as a matter of good seamanship, whereas *N.* was guilty of gross and palpable negligence, whether tested by the regulations or according to the ordinary rules of negligence, in that from the time the vessels first came into full view of each other, at about 1,800 feet, there was abundant time for *N.* to have realized and discharged her duty to take action to avoid the collision, for which she was therefore alone to blame.

S.S. Albano v. *Allan Line Steamship Co., Ld.* [1907] A. C. 193, at 205 and 207; *The Roanoke* [1908] P. 231, at 239; *S.S. Kitano Maru* v. *S.S. Otranto* [1931] A. C. 194, and *The Echo* [1917] P. 132, referred to.

Judgment of the Supreme Court of Canada affirmed.

Appeal (No. 23 of 1947) from a judgment of the Supreme Court of Canada (Rinfret C.J., Kerwin, Taschereau, Rand and Kellock JJ.) (April 11, 1946) varying a judgment of the Exchequer Court of Canada, Nova Scotia, Admiralty District (Carroll J.) (October 27, 1944) by which it was held that the *Alcoa Rambler* was three-fourths to blame and the *Norefjord* one-fourth to blame for a collision which occurred between the two vessels on August 20, 1942, in Bedford Basin in the Province of Nova Scotia. The Supreme Court of Canada

J. C.

1949

Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government v. The Alcoa Rambler (Alcoa Steamship Co., Inc., Owners).

unanimously held that the *Norefjord* was alone to blame for the collision.

The facts appear from the judgment of the Judicial Committee.

1948: Nov. 22, 23, 24, 25, 29, 30. *Carpmael K.C.* and *Porges* for the appellant. The main question is whether the *Alcoa Rambler* was under a duty within the meaning of art. 19 of the Regulations for Preventing Collisions at Sea to keep out of the way of the *Norefjord,* which was at all material times on the starboard hand of the *Alcoa Rambler* and on a course crossing that of the *Alcoa Rambler* from starboard to port. The trial judge held that the *Norefjord* was the stand-on vessel within the meaning of that article, and that the *Alcoa Rambler* was the give-way vessel. The case for the appellant is that the Collision Regulations apply in toto, which would include arts. 27 and 29. The respondent is relying, inter alia, on para. 33 (a) of the Public Traffic Regulations for the Port of Halifax, which, they apparently say, superseded the Collision Regulations. That paragraph provided that " ships entering harbour and carrying explosives, " will be escorted . . . . by a Naval Craft flying International " letters I.C. . . . . All ships seeing the Naval vessel flying " International are to keep well clear." It is submitted that the paragraph applies only to ships entering harbour—the *Alcoa Rambler* was leaving harbour. It is also said by the respondent, and so stated in the judgment of the Chief Justice of Canada, that there is a practice that all vessels—outgoing and incoming—shall keep clear of, and give the right of way to, vessels carrying ammunition. It is submitted that the Collision Regulations, made by authority of an Act of Parliament, and adopted in Canada by Order in Council, apply unless they are modified by some other competent rule. The inference to be drawn from the Traffic Regulations is that the Collision Regulations are to continue to apply unless expressly overruled. It is not enough for people to agree to a practice which is in contravention of the Collision Regulations: unless the case comes within arts. 27 or 29 of the regulations the respondent is not able to rely on practice: *The Sylph* (1). The navigation of the *Norefjord* was proper in the circumstances; as the stand-on vessel under art. 21 of the regulations she kept her course and speed until risk of collision became imminent. She had been forced to alter course slightly to starboard to clear a tug and tow and had then ported easy to bring her back on her course before the *Alcoa Rambler* was seen. When she saw her the *Norefjord* put her wheel hard-a-starboard to check her port swing, and it was not until very shortly before the collision that she began to swing to starboard. It is submitted that Carroll J. was amply justified, on this evidence, in finding that the *Norefjord* kept her course: *The Echo* (1). Even if, contrary to the appellant's contention, the *Norefjord* was not the stand-on ship, it would have been unseamanlike for her to have reduced her speed after hearing the signal of three short blasts from the *Alcoa Rambler*, which was sounded very shortly after the *Alcoa Rambler* came into view. That vessel knew, or ought to have known, what the *Norefjord* was doing, and if that is right, then she was clearly wrong in not taking action earlier. She failed to take effective steps to comply with her duty under art. 19 of keeping out of the way. Further, even if she was under no duty under art. 19, she failed to take sufficient action in due time under arts. 27 and 29 to avoid the collision. There was failure to put the engines astern in due time. The *Norefjord* was the stand-on ship, and so under a duty to keep her course and speed, and there was a substantial compliance with the stand-on rule. The *Alcoa Rambler*, being the give-way ship, failed to keep clear and ought to be held alone to blame for the collision.

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(1) (1854) 2 Spinks Ecc. & Ad. 75, 79.

On the question whether the B. and the I.C. flags on the *Alcoa Rambler* and the escort launch indicated any other course of conduct as between the two vessels, the mere flying of flags does not abrogate the Collision Regulations in any way: *The Tranmere* (2). As to what the flags should have conveyed, if seen, first there is the finding that there was little or no wind, so they could not be seen or understood. Supposing, however, that they had been understood, they were not special circumstances within the meaning of arts. 27 and 29. Merely to exhibit International Code signals does not put a duty on another vessel which is not already there. [On the question of the application of good seamanship to the particular facts of the case reference was made to *S.S. Heranger* (*Owners*) v. *S.S. Diamond* (*Owners*) (3).] The *Alcoa Rambler* should alone be held to blame.

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(1) [1917] P. 132.
(2) [1920] P. 454.
(3) [1939] A. C. 94, 100, 102.

J. C.
1949
Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government
v.
The Alcoa Rambler (Alcoa Steamship Co., Inc., Owners).

Hayward K.C., *Roland Adams* and *Harold Brandon* for the respondent. It is not a question of the Collision Regulations being superseded, but as to which rule was operative in the circumstances. By reason of the special circumstances, arts. 19 and 21 were not applicable, but arts. 27 and 29 were. Alternatively to that proposition, even if arts. 19 and 21 did apply, the *Alcoa Rambler* complied with art. 19 and the *Norefjord* did not comply with art. 21. With regard to the local Traffic Regulations, it is conceded that on the strict and legal construction of para. 33 (a) it does not apply, but on the common-sense view it may well be taken to have been intended to apply equally to ammunition vessels proceeding both into and out of the basin, since there is no difference from the point of view of the danger which those regulations provide against. The evidence is sufficient to show that whether the paragraph applies or not, it was not acted upon. Reliance is strongly placed on the Order in Council made under the War Measures Act requiring compliance with orders by signal or otherwise given by naval officers. The flying of the I.C. flag from a naval launch escorting an ammunition ship was an order by signal, and that signal was, or ought to have been, seen at least as far as the *Norefjord* saw the *Alcoa Rambler*, and in time to appreciate it and act on it. Reliance is also placed on the verbal order, namely, the hailing from the escort launch, and that was given at a latter time, when the *Norefjord* could have gone astern at once and so have avoided the collision. The duty on the *Norefjord* on seeing the flags was to act under arts. 27 and 29 and at once to stop her engines; secondly, if she could not direct her course to starboard she should have refrained from sounding one short blast; thirdly, if necessary, as is submitted it was, in order to avoid crossing dangerously close to the *Alcoa Rambler*, she should have reversed her engines full speed and sounded three short blasts. It has never been claimed that the *Alcoa Rambler* had the right of way. The *Norefjord* sounded the one short blast at an improper time and in such circumstances as to mislead and, in fact, misled, those on board the *Alcoa Rambler*: the signal should be strictly construed—I am, not I intend, moving to starboard: Marsden's Collisions at Sea, 8th ed., p. 444; here, in spite of her one short blast, she turned four points to port. There is nothing in this case to justify the contention that the *Norefjord* kept her course. It is admitted that she kept her speed. It is not only quite clear that she did not keep her course, but that she never intended to do so, and that by her action she realized from the outset that special circumstances applied, and under the special circumstances the *Alcoa Rambler* has never claimed any right of way—both vessels must take such steps as they could to avoid collision. It was too close a distance from which to apply the crossing rule : as to when a crossing position materializes, see *The Gulf of Suez* (1). The allegation was breach by the *Alcoa Rambler* of art. 19, but the crossing rule cannot be applied to her until she had an opportunity of knowing that the other vessel was crossing. The Supreme Court was right in finding the *Norefjord* alone to blame.

Carpmael K.C. replied. No charge of negligence could be founded on the *Norefjord* swinging to port or the helm action she took. From the outset the *Alcoa Rambler* knew that it was her duty to keep out of the way, and she took some action to comply with that duty, and that is the position which ought to be adopted in deciding this case. Very late action was taken by the *Alcoa Rambler* in putting her engines astern.

1949. Feb. 14. The judgment of their Lordships was delivered by LORD WRIGHT. This is an appeal from the unanimous decision of the Supreme Court of Canada, holding the appellants, the owners of the Norwegian steamship *Norefjord*, solely to blame for a collision which occurred on August 20, 1942, between the *Norefjord* and the United States steamship *Alcoa Rambler* (hereafter called the *Rambler*), the owners of which were respondents in the appeal. The case was tried in the first instance in the Exchequer Court of Canada, Admiralty Division, by Carroll J., who held both vessels to blame, apportioning the blame as to three-fourths to the *Rambler* and as to one-fourth on the *Norefjord*.

The collision occurred in the Bedford Basin in the Harbour of Halifax, Nova Scotia. The Basin is a large expanse of water, a few miles in length and breadth, roughly rectangular or rather, perhaps, oval in shape, its greater length being from north to south. At the south-eastern corner there is an exit called the Narrows, leading into a channel which runs past the City of Halifax to the Atlantic. The water in the basin is deep; in some places soundings are 100 feet or over. In 1942, it was an area much congested, as was natural in war time, crowded with vessels at anchor or in motion, estimated to number 100 or more, in addition to smaller craft, such as tugs, barges, launches and the like. There were recognized anchorages at various places, but under the stress of war conditions vessels might find anchorage in almost any part of the basin. The fairway from the northern or north-western area of the Narrows ran about S.S.E. To the east of the fairway there was a long stretch called the Degaussing Range, running a little east of south, in which various operations connected with the degaussing of vessels were carried out under the Canadian Naval Authorities, Lieutenant Dyke, who gave evidence at the hearing, being in command. On the day of the collision both the *Norefjord* and the *Rambler* were anchored at their respective berths, the *Rambler* at an anchorage about the north-west corner of the basin, and the *Norefjord* at an anchorage well down to the south on the west side. It happened that the two vessels quite independently started off on their different manœuvres at about the same time on the morning in question. The weather was fine and clear, there was no tide or current to speak of, and very slight, if any, wind. Each vessel was in charge of a duly qualified Halifax Harbour pilot. Each vessel was heavily loaded.

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(1) [1921] P. 318.

The *Rambler* is a United States screw steamship of 5,500 tons gross and 3,381 tons net, register, 417 feet in length and 54 feet beam; she is fitted with turbine engines, of 3,000 horse-power, driving a single shaft with a right-handed screw. Her cargo partly consisted of United States Army war stores, but also included 1,500 tons of bombs, a dangerous cargo making her an ammunition ship within Canadian War Regulations and the special practices of the port of Halifax. Her speed before she sighted the *Norefjord* was about 5 or 6 knots. The *Norefjord* belongs to the port of Oslo, and was at the time under requisition by the Norwegian Government, her cargo consisted of 4,653 tons of sulphur. She had reciprocating engines. Her net tonnage is 1,917 tons, her length 331 feet, her beam 46 feet. Her speed on the morning in question was maintained at about 6 knots until just before the collision. Though both vessels started about the same time, their destinations were different. The *Rambler* intended to proceed down the fairway to go through the Narrows and then by the channel into the Atlantic for gun practice. The *Norefjord* intended to make for the Range, entering it at the southern end. The *Rambler's* course was about S.S.E. magnetic. From her starting point the *Norefjord* had to go somewhat north of east to reach the Range. The *Norefjord* was pushed by a tug at her anchorage into an easterly heading in order to start. The *Rambler* started under her own steam. It was about 9.14 or a little before when the vessels sighted each other, at a distance, it is estimated, of about 1,800 or 2,000 feet. The evidence of the pilot of the *Norefjord* was that he intended to cut right across the fairway in one manœuvre to the Range, notwithstanding the intervening crowd of shipping. Obviously his course to the Range could not be straight because he had to progress not only in an easterly direction but also make some distance to the north, because the point at which he intended to come upon the Range was substantially north of the point from which he started. He intended to cut the corner, as it were, instead of proceeding east and then turning north. His approach, therefore, was what he was willing to describe as a "curved course." The evidence is that he was constantly swinging to port. It was a "curving course." That was not merely to avoid obstacles like the tug and barge which he met just before sighting the *Rambler.* Mere deviations from a straight course might be merely ordinary incidents of manœuvre in passing through an area congested with shipping, but a deliberate departure from keeping a defined course would be a different matter.

It may be noted here that neither pilot was working to compass courses or taking bearings or fixes. It was not necessary for the pilots to do so. They were manœuvring in clear daylight in full view of their destinations and of all the intervening shipping. But the situation was complicated by the number of vessels all over the basin and the constant changes of direction necessitated in order to avoid vessels at anchor or moving. In these conditions it was difficult to get uninterrupted views ahead or around. All this greatly increased the danger of what the *Norefjord* was doing when she set out to cut across the basin at considerable speed right across the fairway and in the track of outgoing and incoming ships and in the midst of other vessels moving about in so busy and congested an area. The conclusion of this appeal cannot depend on the nice assessment or comparison of points, angles, bearings or distances, but on the broad features on which alone a decision can be reached. It has been accepted that the times in the

J. C.
1949

Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government v. The Alcoa Rambler (Alcoa Steamship Co., Inc., Owners).

rough scrap notes kept by the engineer of the *Rambler* are substantially accurate. They will be set out here in a moment. Before doing so it may be convenient to mention a special complication which arises from the nature of the *Rambler's* part cargo of explosives. This put her in the category of an ammunition ship and brought her within the range of various provisions and regulations ruling in the port of Halifax. Ammunition ships were by law or, at least, by practice required to carry the red flag B. of the International Code of signals and to be escorted in and out of the harbour by launches each carrying the flag B. and also a second flag bearing the initials I.C., which signifies "Keep away." This was done in the case of the *Rambler*. On it was based a contention which was developed in the Supreme Court that there was a duty on the *Norefjord* which overrode the effect of arts. 19 and 21 of the Regulations for Preventing Collisions at Sea and required the *Norefjord* to give way to the *Rambler* as contrasted with the duty attaching to the *Rambler* if arts. 19 and 21 applied, to keep away from the *Norefjord*, which at all material times the *Rambler* had on her own starboard side. Their Lordships, as will appear later, do not think that the regulations in fact control the situation here. They will accordingly leave till a later stage of this judgment the consideration of the important questions fully discussed by the Justices of the Supreme Court on this aspect of the appeal. It is enough to say that the *Norefjord* must, in their Lordships' opinion, be taken to have been fully aware that the *Rambler* was an ammunition ship, by reason of the flags she and her escort were carrying, in addition to the specific warning or order given to her as she proceeded by the coxswain of the escort vessel.

Their Lordships accept the times which appear in the *Rambler's* engine room rough record after the starting time at about 9 a.m. They are 9.14 slow ahead, 9.15 stop, 9.16½ full astern, 9.17 full astern jingle, 9.17½ full astern jingle. The collision occurred at 9.18. By jingle is meant an urgent ringing from the bridge to the engine room, repeating and emphasizing the urgency of an order already given, ringing the engineer to put every ounce of steam into the execution of the order. It does not mean that the order is not being obeyed by the engineer. The master who gave the "jingles" on the verge of the collision saw the extreme danger then imminent. The order to stop at 9.15 was given because the *Rambler* had seen the masts of the *Norefjord* behind an intervening anchored ship, and when they were seen to be indicating movement on a heading which might be likely to converge on the *Rambler* at an angle of about 2 points he decided to stop the engines. But it was not thought necessary to do more than stop the engines until the other vessel's hull came in sight round the stern of the anchored vessel, or to take the very drastic measure of reversing, which was a serious matter for a laden vessel like the *Rambler* weighing about 9,000 tons. Hence the interval of 1½ minutes before the full astern order was given : it was given immediately the hull of the *Norefjord* was seen and appeared to be cutting across the basin. The order was immediately carried out. But it is in evidence, and accepted by their Lordships, confirmed as it is by the advice of the Nautical Assessors, that it takes 40 seconds in the case of such a vessel with turbine engines for a full astern order to take effect. This may explain the curious evidence given by one of the appellant's witnesses, Verge, the master of the tug attending the *Norefjord*, that when the order was given the *Rambler* instead of going astern went ahead for three minutes. The trial judge accepted that evidence and based on it his finding that the order to stop was not acted upon at once. But in the Supreme Court this conclusion was convincingly analysed and rejected by Kellock J., and their Lordships are in full agreement with that learned judge that Verge's evidence, which was contrary not only to all probability but to the other evidence in the case, cannot be accepted. This seems to remove the sole ground on which the trial judge attributed blame to the *Rambler*. Their Lordships are satisfied that she reversed in good time. They will revert to that issue later. As things were then, even if the *Norefjord* had the status of stand-on ship under the Collision Regulations, a view which their Lordships, as they will explain later, do not accept, the time had come for the *Norefjord* to take action to avoid collision as required by her duty as stated by Sir Gorell Barnes in *S.S. Albano* v. *Allan Line Steamship Company Ld.* (1). Assuming the *Norefjord* had, or thought she had, the status of the stand-on ship the time had come when it was her duty to take action to avoid collision. But she did nothing to this end. Instead, she continued to proceed at six knots as she had been doing up to that time, and continued to do so until just before the actual impact. She had been compelled, she said, to starboard in order to avoid a tug and tow just before

(1) [1940] A. C. 193, 207.

the *Rambler* sighted her, and then to port in order to pass under the stern of an anchored vessel. Thereafter, she said, she put her helm to starboard to correct the port swing. It was then she said, she gave the single blast, which helped to make it difficult for the *Rambler* to understand what the *Norefjord* was doing. It was this signal given in these circumstances which led the trial judge to hold the *Norefjord* to blame to the extent of one-fourth part. Indeed, it must certainly have puzzled the *Rambler* to see the *Norefjord* swinging to port and at the same time hear her one short blast. In any event, the *Norefjord* proceeded at a speed of six knots as she had been doing since she started from her anchorage. She went on doing so, notwithstanding the three short blasts sounded by the *Rambler* when she went astern, and notwithstanding the K. or danger signal (one long, one short, one long), also sounded by the *Rambler*, meaning "You should "stop your vessel immediately." There was also the warning given from the escort vessel. Rand J. in the Supreme Court has calculated that the *Norefjord* went about 1,800 feet from the time the vessels came into full view until the collision. Their Lordships think this figure should be taken as substantially correct. There was abundant time for the *Norefjord* to realize and discharge her duty to take action to avoid or, at least, minimize the effect of the collision. She, however, did not change course or speed until just before the collision when it was too late to avert the impact. The *Rambler* came in contact with the port side of the *Norefjord* about 215 feet abaft her bow. The blow was almost right angled, perhaps at 75 degrees. The *Rambler* was then almost stationary—moving at most at one knot, but her great weight was sufficient to do the damage to the *Norefjord*, which was in the way of the engine room and stokehold. The abortive and belated efforts which the *Norefjord* made at the last moment could not affect the result, though she dropped both anchors and went astern and then ahead and astern in order to help her swing to starboard. Lieutenant Dyke, who had been waiting in his launch for the *Norefjord*, has excellently plotted out the final movements. It appears that the *Norefjord* had changed 4 points from the bearing on which she started, which agrees with the swinging to port spoken of by the witnesses and was inevitable if the *Norefjord* was to achieve her curving course and reach the Range as it was intended. Lieutenant Dyke gave evidence that while he waited, she was constantly swinging to port.

The appeal has been principally, but not entirely, argued before their Lordships on the navigational issue. In the Supreme Court the majority of the learned judges, who gave reserved judgments, rested their decisions on the status of an ammunition ship in the port of Halifax. Their Lordships, who have heard elaborate arguments on the questions of navigation and seamanship which are involved, think that the appeal can be sufficiently decided on these issues for reasons which can now be stated. They will later add some observations on the important issues emerging because the *Rambler* was an ammunition ship. In the forefront of the appellants' case it is stated that " the main question in this appeal is whether " the *Alcoa Rambler* was under a duty within the meaning " of art. 19 of the Regulations for Preventing Collisions at " Sea to keep out of the way of the *Norefjord* which was at " all material times on the starboard hand of the *Alcoa* " *Rambler* and on a course crossing that of the *Alcoa Rambler* " from starboard to port." Their Lordships, however, do not think that question correctly or sufficiently states the problem. If it be granted, as it must be, that the *Rambler* had the *Norefjord* on her starboard side, there still remains the question whether the *Norefjord* was on a crossing course or on a " course " at all. Their Lordships think this should be answered in the negative, but even if it were answered in the affirmative, there would still remain for consideration whether the risk of collision was not such as to put the duty of taking action on the *Norefjord* at the moment, or practically at the moment, when the ships first sighted each other, and the *Norefjord* did not discharge that duty. That is to say, if arts. 19 and 21 ever applied, they were superseded by art. 27. In either event, the case will have to be decided on grounds of good seamanship and according to the common law of negligence. Articles 19 and 21 have always to be read together with art. 27, which imposes an imperative obligation on the stand-on ship as soon as the necessary conditions are fulfilled. This principle is clearly stated by Sir Gorell Barnes P. in *The Albano* (2), where he said of the master of the stand-on vessel that " he must keep his course and speed up to some " point (that is the time at which he must take some action), " and then act, but the precise point must necessarily be " difficult to determine, and some little latitude has to be " allowed to the master in determining this." Article 27 is

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(1) [1907] A. C. 193, 207.

J. C.

1949

Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government *v.* The Alcoa Rambler (Alcoa Steamship Co., Inc., Owners).

imperative "In obeying and construing these rules, due "regard shall be had to all dangers of navigation and collision, "and to any special circumstances which may render a "departure from the above rules necessary in order to avoid "immediate danger."

Articles 19 and 21 presuppose as their essential conditions that the vessels must be crossing vessels and crossing so as to involve risk of collision. It is only when these conditions are present that the articles apply, and when they cease to be present the articles cease to apply in the full sense, that is disregarding for the moment art. 27. But the problem does not depend merely on physical circumstances. As the purpose of arts. 19 and 21 is to impose a duty on the give-way ship to keep clear, that ship must be in a position to appreciate what the situation is and to know what the other ship is doing, and whether it is on a course at all or, if so, on what course. In the present case the *Rambler* was presented with two alternative possibilities in regard to the *Norefjord*; she might be making for the Narrows or some other place on the east side of the basin or elsewhere; but the *Rambler* could not in the circumstances say which. If the *Norefjord* was going to the Narrows she was clearly not a crossing vessel, if she was making across the basin that would be a different situation. When the vessels first sighted each other, the *Rambler* was left in doubt: even if, which is doubtful, she ever received reliable notice that the *Norefjord* was making for the Range, that notice was too late because in any view it did not reach her until she had stopped. The question whether the two vessels were crossing vessels within the article thus depended on the purpose of the *Norefjord's* movement, so far as that purpose could be inferred by the master of the *Rambler* from what he saw. The issue always depends on the reasonable inference to be drawn by the ship which has the other on her starboard side as to the latter vessel's future course deduced from observation of her movement at the relevant moment, making due allowance for the nature of the locality where she is at that moment. So it is stated in *The Albano* (1) in a quotation made by Sir Gorell Barnes from Lord St. Helier in *The Pekin* (2). Thus there are two questions: 1., was the *Norefjord* on a crossing course, i.e., was she on a course at all, and if so, was it a crossing course so as to be likely to involve risk of collision; 2., was the situation such that the *Rambler*,

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(1) [1907] A. C. 205.

(2) [1897] A. C. 532, 536.

J. C.

1949

Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government v. The Alcoa Rambler (Alcoa Steamship Co., Inc., Owners).

the give-way ship, could appreciate what the situation was so as to be able to act as the rule prescribes.

It is difficult to define what is meant by " course " in this connexion. It has been said that it does not mean " the actual " compass direction of the heading of the vessel at the time " the other is sighted " ; so it was said by Lord Alverstone C.J. in *The Roanoke* (1), citing *The Velocity* (2), where it was held that the course of a ship going round a bend in a river could not be determined by her heading at the moment when she was at the turn of the bend. Lord Alverstone adds : " A " vessel bound to keep her course and speed may be obliged " to reduce her speed to avoid some danger of navigation, and " the question must be in each case, ' is the manoeuvre in which " ' the vessel is engaged an ordinary and proper manœuvre " ' in the course of navigation which will require an alteration " ' of course and speed ; ought the other vessel to be aware " ' of the manoeuvre which is being attempted to be carried " ' out ? ' " (3). It is only when the give-way vessel is aware or ought to be aware of that fact that the vessels are crossing vessels within arts. 19 and 21 because that awareness is a necessary condition. This implicitly, at least, involves that prima facie any alteration of direction is inconsistent with the idea of a " course " within the meaning of the regulations. These principles are illustrated by *The Albano* (4), where the manoeuvre was being executed in order to pick up a pilot : other illustrations given were stopping and turning to get to a wharf, and the like. The test always is : was what was being done open and notorious to a seaman on the other ship in the ordinary course of navigation. There is, however, a more general question which has to be considered in this case, namely, whether what the *Norefjord* was doing was being on a " course " when she was making what the pilot called a curved course. The ordinary idea of a course is a sufficiently constant direction of a ship on the same line or heading. This will enable a navigator when he sees the other vessel to know if she is on a crossing course. He can often only become aware of that if he can keep the other vessel under observation for sufficient time to ascertain if she is or is not changing her heading. In the open sea this is the usual procedure : as, for instance, in the *S.S. Kitano Maru* v. *S.S. Otranto* (5). In that case the navigating officer of the

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(1) [1908] P. 231, 239.
(2) (1869) L. R. 3 P. C. 44.
(3) [1908] P. 239.
(4) [1907] A. C. 193.
(5) [1931] A. C. 194.

J. C.
1949
OIVIND LORENTZEN, AS DIRECTOR OF SHIPPING AND CURATOR OF THE ROYAL NORWEGIAN GOVERNMENT
v.
THE ALCOA RAMBLER (ALCOA STEAMSHIP CO., INC., OWNERS).

Otranto, the stand-on ship, watched the give-way ship, the *Kitano Maru*; he first saw the latter vessel when 6 or 7 miles distant, a little before 8.30: he took a compass bearing and then took another: at 8.40, finding she was not altering her bearing, he sent for the captain; then at 8.45, as her bearing still was unaltered, the situation was considered so dangerous as to justify and require the *Otranto* to take action for the other vessel. This was held to be correct to that extent, though she was the stand-on ship. But the helm action which he took was the wrong action: she should have stopped and reversed. This case is cited here as an illustration of the critical test for inferring that the vessel is on a course, that her bearing does not alter. It may often not be possible in narrow or congested waters; in the present case it could not be applied in regard to the *Norefjord*. If, however, it had been possible to watch her movement for some time, the manœuvre would not have shown that she was keeping a steady course: her heading would have been altering to port. A curved or curving course, constantly changing under a port helm would not have enabled the give-way vessel to decide how to act for her. Accordingly, of the two conditions that she should be on a course and that the give-way vessel should be able to ascertain that, neither was fulfilled. It may be that in crowded or congested areas, it may not always be possible to ascertain whether the necessary conditions exist. In such cases arts. 19 and 21 cannot apply. But wherever possible arts. 19 and 21 ought to be applied and strictly enforced because they tend to secure safe navigation. It is for this reason that the principles laid down in cases like *The Velocity* (1), *The Echo* (2) and others have been found advantageous, because they have enabled a wider scope to be given to the crossing rule, even in cases where in a strict sense there is deviation from the ship's course. They also illustrate the importance attached to the necessity of attributing to the give-way ship actual or imputed knowledge of the situation.

In the present case there was no obvious or ordinary manoeuvre which would give knowledge to the *Rambler*, so that quite apart from the difficulty inherent in a curved course, the case could not be held to be a case of crossing vessels because the necessary knowledge of the situation could not be ascribed to the *Rambler*.

In any event, the *Rambler* took correct action at the proper moment. There was no real question here of helm action being the best course. As to stopping or reversing, the only question raised was whether she should have reversed when she merely stopped. Their Lordships have indicated their conclusion that stopping and not reversing was the correct step at that moment. On that issue, which is a matter of good seamanship, their Lordships have taken the advice of the Nautical Assessors, whose opinion coincides with their own. They think the *Rambler* free from blame. She took appropriate action at the appropriate moment as a matter of good seamanship. Their answer to their Lordships' question is " In our opinion the *Rambler* took a reasonable and prudent " precaution in stopping her engines on sighting the masts " of a ship which was under way, and in our opinion good " seamanship did not require her to reverse her engines at " this stage." This disposes of the suggestion that the *Rambler* should have reversed at the earlier stage, which is the only serious objection suggested against what she did. As to the *Norefjord*, the advice of the Nautical Assessors is that when the *Norefjord* in the circumstances saw the *Rambler* " good " and careful navigation called for the *Norefjord* to stop " her engines and thence proceed with caution until she saw " her passage clear. This she could have done with perfect " safety in the weather prevailing." Instead, she was guilty, in the circumstances stated above, of gross and palpable negligence, whether tested by the regulations or according to the ordinary rules of negligence. She seems to have gone on in complete oblivion of the presence of the *Rambler* notwithstanding all the warnings and signals that were given to her. Their Lordships think the *Norefjord* alone to blame and liable for the whole damage.

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(1) L. R. 3 P. C. 44.

(2) [1917] P. 132.

Their Lordships accordingly agree with the unanimous conclusion of the Supreme Court that the *Norefjord* was solely to blame. But they do so solely on navigational grounds and have not thought it necessary to examine, or come to a decision on, the important questions of the law and practice of the Port of Halifax on which the majority of the Supreme Court judges largely based their decision. During the first world war the Bedford Basin was crowded with shipping (as it has been during the last world war), including many ammunition ships. In 1917 one of these latter was run into while in the basin and as a result of the collision blew up. The explosion wrecked the City of Halifax and killed about

17,000 of the inhabitants. Early in the last world war, a Canadian Order in Council, D.C. 2412, issued under the Canadian War Measures Act, provided for the governmental regulation of navigation within Canadian waters, and among other things by cl. 1 required every vessel in those waters to comply with such orders as to the navigation and mooring of vessels as may be issued by the Minister, and to obey any orders given, whether by signal or not, by any officer in command of any of His Majesty's Canadian ships. By para. 33 (*a*) of certain regulations issued pursuant to the above Order in Council, ships entering harbour and carrying explosives were to be escorted by Naval Craft flying letters I.C., and later when proceeding to a berth in the basin. "All ships seeing "the Naval vessel flying International are to keep well clear." There was no express provision for ammunition ships proceeding out of the basin as the *Rambler* was, but there was a practice, well known to the pilots concerned, including the pilot of the *Norefjord*, imposing the same requirements on vessels proceeding outwards as on vessels proceeding inwards.

In these circumstances, the Chief Justice in the Supreme Court held that these local regulations, coupled with the known and terrible risks of an explosion, constituted "special "circumstances" within art. 27 of the Regulations for Preventing Collisions at Sea "which may render a departure "from the above rules necessary in order to avoid immediate "danger." He held the *Norefjord* solely to blame for not keeping out of the way of the *Rambler*, on account of her dangerous cargo. He held that the *Rambler* was entitled to stand on her status as an ammunition ship and assume that the *Norefjord* would keep out of her way. Kerwin J's. concurring judgment gave no reasons. Taschereau J. did not invoke para. 33 (*a*), but held the *Norefjord* solely to blame for faults in navigation, specially emphasizing her wrong single blast signal. Rand J. based his decision in respect of the liability of the *Norefjord* on the local regulations, as being special rules of a local authority within art. 30 of the Collision Regulations and hence paramount to arts. 19 and 21. His review of the navigation was however definitely in favour of the *Rambler*. Kellock J., whose criticisms of the findings of the trial judge have already been referred to, was of opinion that the *Norefjord* was not on a course when she first saw the *Rambler*. He held that the Naval Escort vessel gave an "order" to the *Norefjord* which constituted under para. 33 (*a*) of the regulations made under the Order in Council an absolute obligation to keep clear of the *Rambler*; in respect of her seamanship he found nothing to blame.

Their Lordships do not think it necessary either to affirm or disaffirm the opinions expressed by the Supreme Court on the local regulations or the law and the practice in the Port of Halifax. They may, however, observe that even apart from these regulations and practice the balance of the opinions delivered by the court is generally, so far as concerns navigation, in favour of their Lordships' view as to the culpability of the *Norefjord*. They will humbly advise His Majesty that the appeal should be dismissed and the judgment of the Supreme Court of Canada affirmed. The appellants will pay the costs of the appeal.

J. C.
1949
Oivind Lorentzen as Director of Shipping and Curator of the Royal Norwegian Government *v.* The Alcoa Rambler (Alcoa Steamship Co., Inc., Owners).

Solicitors for appellant: *Constant & Constant.*
Solicitors for respondent: *William A. Crump & Son.*

Considered. Bereng Griffiths Lerotholi *v.* The King [1950] A. C. 11

Not followed. Gideon Nkambule *v.* The King [1950] A. C. 879

[PRIVY COUNCIL.]

J. C.*
1949
Jan 13;
Feb. 14.

TUMAHOLE BERENG AND OTHERS . . APPELLANTS;
AND
THE KING . . . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF BASUTOLAND.

Basutoland—Criminal law—Charge of murder—Evidence of accomplices—Corroboration—Statutory requirements—English rule of practice—Construction of amended Act—Resort to original Act—Administrative officer sitting with judge—Pre-trial irregularity—Basutoland Criminal Procedure and Evidence Proclamation (*No.* 59 *of* 1938) (*as amended by s.* 1 *of the Criminal Procedure and Evidence* (*Amendment*) *Proclamation* (*No.* 12 *of* 1944)), *s.* 231—*Basutoland High Court Proclamation* (*No.* 57 *of* 1938) (*as amended by s.* 1 *of No.* 41 *of* 1942), *s.* 7.

By s. 231 of the Basutoland Criminal Procedure and Evidence Proclamation, 1938, as amended by s. 1 of the Basutoland Criminal Procedure and Evidence (Amendment) Proclamation, 1944: "Any court which is trying any person on a charge of any offence

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* *Present:* Lord MacDermott, Lord Reid, Sir Madhavan Nair and Sir John Beaumont.

J. C.

1949

TUMAHOLE BERENG
v.
THE KING.

"may convict him of any offence alleged against him . . . . on "the single evidence of any accomplice: Provided that the "offence has, by competent evidence, other than the single and "unconfirmed evidence of the accomplice, been proved to "the satisfaction of such court to have been actually committed."

The only evidence implicating the appellants in the alleged killing of one K., with and for whose murder they were charged and convicted, was that of two alleged accomplices, and there was no evidence in the case sufficient to confirm the two accomplices in proving, or to prove aliunde, that K. was murdered at all.

Held, that the words "the single evidence of any accomplice" in s. 231 mean "the unsupported evidence of any accomplice "or accomplices"; that the expression in the proviso "competent "evidence" means no more than the admissible evidence of a competent witness; that, as in the opening part of the section, the words in the proviso "other than the single and unconfirmed "evidence of the accomplice" must include the plural and make accomplices an indivisible group for the purposes of the proviso, to meet the demands of which some proof that is not subject to the taint attaching to their testimony must be adduced. Accordingly, the evidence in the case failed to establish the fact of murder as required by s. 231 and the conviction was beyond the powers of the court and was bad.

Since the terms of s. 231, as amended, were sufficiently difficult and ambiguous to justify, for the purposes of its construction, consideration of its evolution in the statute-book as a proper and logical course, and since also the object was to ascertain the true meaning of that part of the section which still remained the same after, as before, amendment, and which there was no good ground for thinking the substitution of the new proviso was intended to alter, the circumstances of the present case put it beyond the mischief discouraged by Lord Watson in *Bradlaugh* v. *Clarke* (1883) 8 App. Cas. 354, at p. 380, in connexion with construing an existing statute by resorting to the terms of the Act before amendment.

An accused admits nothing by exercising at his trial the right of electing not to deny the charge on oath, and silence of that kind affords no corroboration to satisfy the cautionary rule of English law that it is unwise to act on accomplice evidence which is uncorroborated in some material respect implicating the accused. Nor does an accused corroborate an accomplice merely by giving evidence which is not accepted and must, therefore, be regarded as false. If the other material is insufficient, either in its quality or extent, to sustain a verdict against the accused, the failure to give evidence or the giving of false evidence cannot be used as a make-weight. To hold otherwise would be to undermine the presumption of innocence in a manner as repugnant to the Proclamation of 1938 as to the common law of England. The trial judge, in holding that the rule of practice was satisfied by the non-denial by the appellants of the evidence given by the accomplices incriminating the appellants, had misdirected himself as to the nature of the corroboration required by the rule of practice, and in the circumstances the misdirection was a matter of grave consequence which would, had it been necessary, have justified the appeal being allowed on that ground also. For the purposes of the rule of practice the evidence of one accomplice is not corroborative of the evidence of another.

Rex v. *John* S. A. L. R. [1943] T. P. D. 295, referred to.

Where, before the trial, and in the absence of the appellants or their representatives, the administrative officer who sat with the judge pursuant to and for the purposes of the relevant statutory provisions, had acquainted himself with certain material aspects of the Crown case in the company of a number of Crown witnesses, and had interrogated one of the two accomplices regarding several important aspects of his evidence, his subsequent participation in the trial was highly irregular, and, as was said in *Mahlikilili Dhalamini* v. *The King* [1942] A. C. 583, at p. 590, " must amount " to such a disregard of the forms of justice as to lead to substantial " and grave injustice within the rule adopted by this Board in " dealing with criminal appeals."

Appeals allowed and convictions set aside.

APPEAL (No. 32 of 1948), by special leave, from a judgment of the High Court of Basutoland (October 25, 1947) whereby the seven appellants were convicted of the murder of one Katse Phatela on December 25, 1945, at Phatela's in the District of Qach's Nek, and sentenced to death.

The following facts are taken from the judgment of the Judicial Committee. The case for the Crown was that the killing of Katse was a ritual murder committed by ten persons for the purpose of obtaining human blood to be used by a witch-doctor named Molumo Kaphe in connexion with a dispute about land. Of those ten, the witch-doctor died in gaol while awaiting trial and two others, Jan Gat and Maama Molahlehi, gave evidence for the prosecution. The remaining seven were the appellants. The Crown testimony in support of the charge was to the effect that Katse was chosen by appellant No. 1 as the victim whose blood was required; that a feast previously arranged by appellant No. 1 was held in the hut of appellant No. 2 on Christmas Day, 1945; that Katse was there plied with drink until he was insensible; that he was taken out of the hut after dark and carried by some of the ten persons already mentioned, the others accompanying them, to a spot about 500 yards away where he was hit on the head with a pick-handle and throttled; that the witch-doctor next pierced or stabbed Katse's head behind the right ear with a sharp pin and caught the blood from the wound in a tin;

that Katse was then carried to the edge of a krantz or cliff, some 21 feet high, and thrown over into a stream; and that several of the appellants followed him down and confirmed he was dead.

Such, in broad outline, was the story sworn to by each of the accomplices, Jan Gat and Maama Molahlehi. Their versions differed in certain points, but in substance they told the same tale. Apart from their testimony there was no evidence sufficient to implicate the appellants in the offence alleged. Whether there was any other evidence showing that Katse had been murdered by someone was a disputed question. His dead body was found on December 26 and buried on the 28th. On January 10, 1946, it was exhumed and examined by Dr. R. C. Ogg, who proved the cause of death to be " injury to the brain from a fractured skull and a " fractured femur."

The case made by the appellants at the trial challenged the contention that Katse had been murdered and suggested that he had met his death by falling over the krantz while on his way home drunk. Appellant No. 2 elected to give evidence on oath denying the charge, but his testimony was not accepted. The other appellants did not give evidence, but contented themselves with statements from the dock, after verdict given, protesting their innocence. In addition to appellant No. 2 several witnesses were called for the defence, the gist of their evidence being that the deceased left the feast before it ended and while the appellants or some of them were still there, and that Jan Gat and Maama Molahlehi spent the hours of darkness, during which the murder was alleged to have occurred, asleep in the hut of the witness Dora Mafatela.

As stated, each of the appellants was convicted by the High Court of Basutoland (Grindley-Ferris J.), and one of the questions raised by this appeal was whether the court was entitled to convict the accused on the evidence of two accomplices, having regard to the law of Basutoland governing the corroboration of an accomplice's evidence, which was contained in s. 231 of the Basutoland Criminal Procedure and Evidence Proclamation, 1938, as amended by s. 1 of the Criminal Procedure and Evidence (Amendment) Proclamation, 1944, and which provided that : " Any court which is trying " any person on a charge of any offence may convict him of "any offence alleged against him in the indictment or summons "on the single evidence of any accomplice: Provided that "the offence has, by competent evidence, other than the single "and unconfirmed evidence of the accomplice, been proved "to the satisfaction of such court to have been actually "committed."

1949. Jan. 11, 12, 13. *Casswell K.C.* and *Molony* for the appellants. The trial judge failed to comply with the provisions of s. 7 of the Basutoland High Court Proclamation of 1938 as amended by No. 41 of 1942, whereby the decision was vested exclusively in him, and the judgment was arrived at in an irregular manner involving a misunderstanding and misuse of function on the part of members of the court. The phraseology of the judgment points to the fact that the judge regarded himself as the president of a court of three members of equal status and co-extensive duty. He did not refer in terms to the Proclamation. Secondly, since the only clear evidence that the deceased had died an unnatural death and that each of the appellants had participated in the alleged killing was that of the accomplices, it was requisite that their evidence both as to commission of the alleged crime and the identity of the criminal should be corroborated. The judge misconceived and misapplied the law touching corroboration to the facts of the case, and accepted as corroboration matters incapable in law of possessing, or devoid of, corroborative value. The judge stated that "the evidence of one accomplice "is corroborative of the evidence of another so far as the "commission of the crime is concerned." It is submitted as a matter of law that one accomplice cannot be corroborated in any respect by the evidence of a second accomplice. The evidence of such second accomplice is not "competent "evidence" for this purpose within the meaning of the Basutoland Criminal Procedure and Evidence (Amendment) Proclamation, 1944. There must be other "competent "evidence." The judge also accepted the evidence of Dr. Ogg as possessing corroborative value. That evidence does not accord with the construction placed on it in the judgment. The wound above the right ear was about three-quarters of an inch long and lacerated. Dr. Ogg heard the witness Jan Gat describe in court the character of the stab wound which he (Jan Gat) said had been inflicted on the deceased.

Dr. Ogg's evidence was that he found nothing medically consistent with Jan Gat's account. The slight wound in question was consistent with a glancing blow against some projection in the course of a fall. The judge also said that "there is evidence that all the accused attended the feast "as the accomplices said they did." This statement was inaccurate so far as concerns appellant No. 3. In any event, the evidence at the trial established that the feast extended over several hours and was attended by a great number of persons. Accordingly, mere presence thereat constituted no evidence of participation in the alleged crime. Lastly, the judge said that "none of the accused has given evidence "denying taking part in the murder." That statement is inaccurate in relation to appellant No. 2. It is submitted as a matter of law that corroboration cannot arise from the failure of an accused person to give evidence. Generally, it is submitted that all the points which the judge relied on as corroboration were open to grave objection on well-defined legal or factual grounds, and that no sufficient corroboration is to be found elsewhere in the evidence, and in the absence of evidence which was truly corroborative the conviction cannot be upheld.

It was said in *Rex* v. *John* (1) that "where one is dealing "with the rule of practice, corroboration in a material "particular which does not connect or tend to connect the "accused with the crime would seem to provide no safeguard "at all for the accused to meet the risk that the accomplice "may be implicating the accused in order to furnish protection "for some friend of his who is actually concerned in the crime "or possibly to mitigate the seriousness of the offence so far "as he, himself, is concerned." [Reference was also made to *Rex* v. *Sims* (2) and to Archbold's Pleading, Evidence and Practice in Criminal Cases, 31st ed., p. 465.] Section 231 of the Proclamation of 1938, as amended, refers to a case in which one accomplice gives evidence, and the proviso refers to "the accomplice," so that this section really does not cover a case in which, as here, more than one accomplice gives evidence. It may be that "any accomplice" includes the plural, and if there is any ambiguity in the section it is permissible to resolve it by reference to the section as it stood before amendment, where the intention was obviously to include the plural, but, unless there is an ambiguity, if one can extract a meaning from the words of the statute one must not go outside those words: *Bradlaugh* v. *Clarke* (1).

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(1) S. A. L. R. [1943] T. P. D. 295, 300.

(2) [1946] K. B. 531, 544.

The judgment was contrary to the weight of the evidence and could only have been arrived at by leaving out of account important aspects of the evidence highly favourable to the appellants. There was not sufficient evidence, and no real corroboration, of the killing, and the circumstances are equally consistent with Katse having taken the wrong path and fallen over the krantz and thus himself caused his death and the injuries found. Lastly, the conduct of Mr. Driver, the administrative officer called in under the High Court Proclamation of 1938, as amended in 1942, to assist the judge, was improper and unjudicial and out of keeping with his status and function as a member of the court of trial, and constituted so grave a departure from the due and orderly administration of justice that its consequence is to vitiate the trial and judgment. The visit of Mr. Driver to the scene of the supposed crime, and his questioning of Jan Gat, took place between the committal of the appellants for trial and the actual trial. Jan Gat appeared to have been the witness on whom chief reliance was placed. During the course of the trial Mr. Driver intervened to ask questions on his own account of all the principal witnesses. The judge spoke of the court as "we," and obviously placed some reliance on Mr. Driver, and the latter's conduct before the hearing was of the sort that the Board will hold inexcusable: *Ras Behari Lal* v. *King-Emperor* (2).

Molony followed. What the proviso to s. 231, as amended, requires is proof aliunde, and aliunde there is not a scrap of evidence that a crime was committed at all. The judge has not applied his mind to the facts in the light of whether there was a murder apart from the evidence of the two accomplices. The conduct of Mr. Driver vitiates this trial. His position is quite different from that of a jury; he is part of the trial in a much more intimate sense; he sits beside the judge, asks questions, and has the ear of the judge, and retires with him and gives him advice on the case. For a member of the court of trial to carry out a sub-inquiry on his own is a very grave act of misconduct with reference to the judicial functions which he was exercising on this occasion, and has the possibility of verv grave injustice in fact. Here, an inquiry conducted in the absence of any legal representative of the defence is very much more than the irregularity in *Seneviratne* v. *The King* (1). Not merely that justice should be done, but that it should be seen to be done, applies to this case: *Rex* v. *Justices of Bodmin, Ex parte McEwen* (2).

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(1) (1883) 8 App. Cas. 354, 379. (2) (1933) L. R. 60 I. A. 354.

Melford Stevenson K.C. and *Gahan* for the respondent. The view expressed by Schreiner J. in *Rex* v. *John* (3) of the construction of the section in the South African statute, which for all practical purposes is identical with s. 231 of the Proclamation of 1938 as amended, is correct: he said that "the evidence of a second accomplice, covering precisely the "same ground as the first, is sufficient to satisfy the section "and provide the Crown with more than the single evidence "of an accomplice." "Competent evidence" in the proviso to s. 231 includes the evidence of a second accomplice. That submission is assisted by s. 207 of the Proclamation of 1938, for the admissible evidence of a competent witness includes the evidence of a second accomplice. Further, reliance is placed on the original proviso before the amendment as supporting this view. That the familiar duty to warn in an accomplice case was in the mind of the judge appears from the opening sentences of his judgment: "the court is fully aware "not only of the statutory provision regarding the necessity "for corroboration of an accomplice's evidence that the crime "was committed but also of the practice laid down in the case "of *Rex* v. *John* (3) to require in addition to the evidence "to which I have just referred, corroborative evidence that "the accused were implicated." [Reference was also made to Archbold's Pleading, Evidence and Practice in Criminal Cases, 31st ed., p. 437.] The evidence of the two accomplices was properly accepted as true by the court and conclusively established the charge of murder against each of the appellants, and the court was right in finding that their evidence was corroborated by the medical and other evidence. The judgment makes it quite clear that the judge and each of his advisers took the same view of the facts and were satisfied that the charge against each of the appellants had been

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(1) [1936] 3 All E. R. 36, 51.
(2) [1947] K. B. 321, 325.
(3) S. A. L. R. [1943] T. P. D. 295.

J. C.
1949
Tumahole Bereng v. The King

established beyond any reasonable doubt; but the judge did not thereby indicate any failure to realize that the decision was vested in him alone. The Proclamation required him to record the agreement or disagreement of the administrative officer and of the native assessor with the decision. The judgment shows that they were of one mind with the judge. The conduct of Mr. Driver before the trial did not disqualify him from appointment as the administrative officer advising the judge, or from so acting. The responsibility for deciding the case rests on the judge alone, who, it is submitted, carefully considered every aspect of the case and reached the proper conclusion on the evidence. Mr. Driver was not a person exercising any judicial office, and in the circumstances of the case what he did is not shown to have made any difference to anyone. The most that can be said about him is that he was injudicious. There is no good ground for disturbing this judgment.

Gahan followed.

Molony replied. Quite plainly the judge was using the fact that the accused did not give evidence as corroboration, and he could not do that. It is impossible to say one way or the other whether the conduct of Mr. Driver had done any actual harm. We do not know how his views were coloured by what he had heard before the hearing, and it might well be that he came to the case with his mind virtually made up. The risk is there. In the circumstances and to all public appearances he was exercising judicial functions, and played a considerable part in influencing the ultimate decision. *Mahlikilili Dhalamini* v. *The King* (1) throws some light on the functions of administrative officers.

Jan. 13. Lord MacDermott announced that their Lordships would humbly advise His Majesty that the appeal should be allowed and the convictions quashed, and that they would give their reasons later.

Feb. 14. The reasons of their Lordships for allowing the appeal were delivered by Lord MacDermott, who stated the facts set out above and continued: The first question arising for determination is whether it was competent for the High Court to convict the appellants having regard to the state of the evidence and the terms of s. 231 of the Basutoland Criminal Procedure and Evidence Proclamation, 1938, as amended. The only evidence implicating the appellants in the crime charged was that of the two accomplices. It will be convenient to consider now, before referring to the relevant provisions of the Proclamation, whether there was any evidence, in addition to that of the accomplices, to show that Katse had been murdered by someone. At the trial corroboration of the accomplices' story of an intentional killing appears to have been sought in various quarters and the learned trial judge (Grindley-Ferris J.) expressed himself as satisfied that it was to be found in the medical evidence. The material passage in his judgment reads as follows :—" In corroboration " of the evidence of the two accomplices as to the commission " of the crime, if such were necessary, it is to be found in the " evidence of Dr. Ogg who conducted the post-mortem " examination. He found at the back of the right ear of the " deceased a wound which he said might have been caused " by a sharp stabbing instrument such as the stay of an " umbrella being pushed in and forced sideways."

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(1) [1942] A. C. 583, 588.

At the hearing before the Board Mr. Stevenson, for the Crown, did not seek to rely, for this purpose, on any evidence except that of Dr. Ogg or any part thereof save that referred to in the excerpt from the judgment just quoted. Their Lordships are satisfied that this course was fully justified by the evidence and that the field of inquiry may be limited accordingly They do not, therefore, find it necessary to comment on the medical testimony with regard to the other injuries sustained by the deceased save to say that they were all compatible with death by accident. The medical evidence contained nothing to support the story of throttling, and Dr. Ogg was not asked about it. It remains, then, to see whether, as the Crown contended, the injury above the right ear, described by Dr. Ogg as a superficial wound about ½ inch to ¾ inch long, confirms the accomplices' story of the wound made by the witch-doctor for the purpose of drawing blood. It is important to observe that Dr. Ogg was examined immediately after Jan Gat and had been present in court when the latter had not only described but demonstrated how this wound had been made. As much may turn on this question it is necessary to consider the relevant evidence in some detail. Jan Gat swore that "the doctor pierced the deceased with a "sharp pin," that it entered "just behind the right ear, the "back of the head" and that the doctor "withdrew the "needle and then he caught the blood in a tin." In cross-examination the witness gave the demonstration referred to and subsequently, in answer to the judge, stated: "Then "Molumo Kaphe [the witch-doctor] said 'here is the pin "'in my bag' and he took out the pin and then I saw him "stab the deceased with it"; and, later, when asked how high the witch-doctor lifted his hand, he said: "He didn't raise "his hand, the pin was a very sharp instrument that he used." To Mr. Driver, an administrative officer sitting to assist the court in circumstances to be mentioned later, the witness added: "It was a stab, it was not a cut" and, again: "He "[the witch-doctor] probed it before he withdrew the pin." Maama, the other accomplice, was examined after Dr. Ogg. His evidence on this matter was not so detailed as that of Jan Gat, but was to much the same effect. He, too, used the word "pierce" and, speaking of the witch-doctor, said: "As he withdrew that sharp thing which he pierced with "blood came out and he caught the blood in a tin." In cross-examination he was asked how the pin or nail was inserted and answered: "I can't say which way they pierced; "it was a dark night, but I saw that they did pierce him." When Dr. Ogg was called he agreed that he had heard the evidence of Jan Gat. Then came the following questions and answers:

> "While he was being cross-examined this afternoon did "you hear his evidence and in answer to His Lordship, "his evidence about a thrust with a sharp thing which he "called a 'pin' into the deceased's head?—Yes.
>
> "Did you find anything which was medically consistent "with that having happened?—I didn't find anything."

After that the witness said that he might have missed a small puncture made sixteen days before the post-mortem examination, but he did not think it very likely. Subsequently, the learned judge asked him several important questions which, with their replies, read thus:

> "Then you said 'It was not down to the skull,' by that "you mean it was just a flesh wound?—Yes, a superficial "wound, skin and flesh. I couldn't feel the skull, the skull "was covered.

"Would such an injury bleed copiously ?—Yes, it would "bleed.

"Might that wound have been caused by a sharp instrument, possibly like some part of an umbrella ?—It would "if it was sliced but not if it was stabbed.

"Not if it was stabbed ?—It was not a stab wound, it "was about three-quarters of an inch long and lacerated." It cannot be disputed that the wound so described by Dr. Ogg might have been the result of an accidental fall on the rough and rocky ground in the vicinity of the krantz, or that it was, at least, as consistent with such a cause as with that suggested by the prosecution. It could, no doubt, have been due to a sharp-pointed instrument being drawn sideways through the flesh. But that was not the nature of the wounding as deposed to by the accomplices, and their Lordships have no hesitation in holding that their testimony as to the killing was not confirmed by the medical evidence which must now be regarded as consistent with accident throughout. Their Lordships therefore proceed to a consideration of the legal issues on the basis that there was no evidence in the case sufficient to confirm the two accomplices in proving, or to prove aliunde, that Katse was murdered at all.

The Proclamation of 1938 is a codification of the law relating to procedure and evidence in criminal cases in Basutoland. Chapter XII. deals with witnesses and evidence and provides (s. 268) that in any case not provided for by it the law of England as to admissibility of evidence and the competency and examination of witnesses in criminal proceedings shall be followed. In this chapter is s. 231 which, as it stood until 1944, read as follows: "231. Any court which is trying "any person on a charge of any offence may convict him of "any offence alleged against him in the indictment or summons "on the single evidence of any accomplice: Provided that "the testimony of the accomplice is corroborated by independent evidence which affects the accused by connecting or "tending to connect him with the crime: Provided further "that such evidence shall consist of evidence other than that "of another accomplice or other accomplices." This section was amended by s. 1 of the Basutoland Criminal Procedure and Evidence (Amendment) Proclamation, 1944, which is in the following terms: "1. Section two hundred and thirty-"one of the principal law is hereby amended by deleting

" the first and second provisoes and substituting therefor the " following proviso :—" ' Provided that the offence has, by " ' competent evidence, other than the single and unconfirmed " ' evidence of the accomplice, been proved to the satisfaction " ' of such court to have been actually committed.' "

Section 231, therefore, was at all times material to these proceedings, in this form : " 231. Any court which is trying " any person on a charge of any offence may convict him of " any offence alleged against him in the indictment or summons " on the single evidence of any accomplice : Provided that " the offence has, by competent evidence, other than the single " and unconfirmed evidence of the accomplice, been proved " to the satisfaction of such court to have been actually " committed." The question which must now be examined is whether the court, in view of the terms of this provision, had power to convict the appellants on the evidence of the two accomplices standing alone and unconfirmed in any material respect by other evidence. This question is not concerned with any rule of practice based on the dangers of acting on the testimony of accomplices. The power to convict is clearly limited by s. 231, and the present issue necessarily turns on its true construction as respects the extent of the limitation. The amendment of 1944 would seem to have worked an important alteration in the law for, whereas the section in its earlier form made corroboration implicating the accused a condition precedent to conviction, that requirement is not mentioned in the amended section, which does not appear to demand more than additional proof that the offence charged has been committed by somebody. This is a drastic change, as false evidence given by an accomplice is commonly regarded as more likely to take the form of incriminating the wrong person than of imagining the crime charged. Their Lordships must, however, take the section as they find it, and they cannot read the new proviso as referring to proof that " the offence " has . . . . been actually committed " by the accused. So to construe it would leave the object of the amendment obscure and would tend not merely to qualify but to negative the opening paragraph of the section. Their Lordships are therefore of opinion that the conviction cannot be impeached as beyond the powers of the court solely on the ground that the only evidence which implicated the appellants was the evidence of the accomplices.

This leaves for consideration what, on the argument, were the main contentions respecting the meaning of the section. For the Crown it was submitted that the opening words of the section " Any court . . . . may convict . . . . on the " single evidence of any accomplice " showed that the restriction imposed by it on the power of the court only applied whenever the prosecution relied on the testimony of one accomplice and no more and, consequently, that where, as here, the prosecution called two accomplices telling the same story and believed by the court, the case fell outside the section altogether. The use of the word " single " was stressed as emphasizing that the section was only concerned with the irreducible minimum of this particular category of evidence, and some reliance was placed on the fact that s. 231 was one of a group of sections headed " sufficiency of evidence." For the appellants, on the other hand, it was urged that the singular " any accomplice " included the plural and that the use of the word " single," being merely to qualify " evidence," did not indicate the contrary.

Their Lordships are unable to accede to the Crown's argument on this point. The expression " the single evidence of any " accomplice " cannot be read as equivalent to " the evidence " of a single accomplice." The word " single " is plainly used in the sense of " standing alone " or " unsupported " and as qualifying the evidence to which this part of the section refers. As for the question whether the singular " accomplice " includes the plural, the new proviso affords no conclusive answer. In the view of the Board, however, the second of the original provisoes goes to show that the intention was that the plural should be included. It enacted that the corroboration required by the section in its earlier form " shall consist of evidence other than that of another accomplice " or other accomplices." It is impossible on any fair reading of the section in its earlier form to regard this provision as directed to witnesses called for the defence. Even if not limited to the evidence for the prosecution it must, at least, have extended to such evidence; and, if so, the words " any " accomplice " cannot well be confined to the singular. In thus resorting to the terms of the section before amendment their Lordships are not unmindful of the warning given by Lord Watson in *Bradlaugh* v. *Clarke* (1), when he said: " It

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(1) 8 App. Cas. 354, 380.

J. C.

1949

Tumahole Bereng v. The King.

"appears to me to be an extremely hazardous proceeding "to refer to provisions which have been absolutely repealed, "in order to ascertain what the legislature meant to enact "in their room and stead. There may possibly be occasions "on which such a reference would be legitimate. In the "present case the words of the existing Act are, in my opinion, "capable of being interpreted without such foreign aid . . . ." The wisdom of that warning cannot be doubted, but the circumstances of the present case put it beyond the mischief Lord Watson was minded to discourage, and that for two reasons. In the first place, the terms of the section as it now stands are sufficiently difficult and ambiguous to justify the consideration of its evolution in the statute-book as a proper and logical course; and secondly, the object of the instant inquiry is to ascertain the true meaning of that part of the section which remains as it was, and which there is no ground for thinking the substitution of a new proviso was intended to alter.

For these reasons their Lordships conclude that in s. 231 the words "the single evidence of any accomplice" mean "the unsupported evidence of any accomplice or accomplices" and, accordingly, that the section is applicable to the facts of the present appeal.

The next question is whether the fact of murder was established so as to satisfy the terms of the new proviso. The contention of the Crown was that it had been, as the evidence of a second accomplice could, it was said, supply the necessary additional evidence required. This appears to have been the view of the learned trial judge. It also finds support in *Rex* v. *John* (1), a decision of the Supreme Court of South Africa (Transvaal Provincial Division) which was referred to at the trial and before the Board, for there Schreiner J. in the course of his judgment said with reference to an almost identical section: "So also the evidence of a "second accomplice, covering precisely the same ground "as the first, is sufficient to satisfy the section and provide "the Crown with more than the single evidence of an "accomplice" (2). Their Lordships have given the terms of this judgment the close consideration which it merits, but on this point they are unable to accept the proposition it lays down as applicable to s. 231 of the Basutoland

(1) S. A. L. R. [1943] T. P. D. 295. (2) Ibid. 298.

J.C.
1949
Tumahole Bereng
v.
The King

Proclamation. It was suggested on behalf of the appellants that the expression "competent evidence" sufficed in itself to exclude the use of a second accomplice for the purposes of the proviso. Their Lordships cannot agree with this view. They see no reason to hold that the phrase means more than the admissible evidence of a competent witness, and it is clear from the terms of s. 207, if on no other ground, that an accomplice is such a witness. In the opinion of the Board it is the words which follow—"other than the single and "unconfirmed evidence of the accomplice"—that render the contention of the Crown untenable. Though these words speak in the singular they must march with the opening part of the section, and if, as has been held, the singular there includes the plural, the same must be the case in the proviso. Were it otherwise the application of the proviso in instances where the prosecution relied on several accomplices would involve a notional marshalling of the accomplices, one being assigned to satisfy the minimum requirements apart from the proviso and the other or others being used to satisfy the proviso itself. Their Lordships are of opinion that such a strange procedure was not within the contemplation of the enactment. The point under discussion, though raised in the alternative to that previously discussed, really falls with it. If the section applies where the prosecution depends on a number of accomplices they remain an indivisible group for the purposes of the proviso and some proof that is not subject to the taint attaching to their testimony must be adduced to meet its demands.

Their Lordships are, therefore, of opinion that the evidence in the present case failed to establish the fact of murder as required by s. 231, and they accordingly hold that the conviction was beyond the powers of the court and bad. This is enough to dispose of the appeal, but their Lordships think it right to refer to two further matters which it raised and which are of importance in the administration of criminal justice in the Territory. The first of these relates to the cautionary rule of English practice emphasizing the dangers of acting on accomplice evidence (be it that of one or more accomplices) which is uncorroborated in some material respect implicating the accused. It was not suggested that this rule of practice was alien to the conduct of criminal proceedings in Basutoland, or that it had been ousted by the provisions of s. 231. The

J. C.
1949
TUMAHOLE BERENG
v.
THE KING.

learned trial judge clearly regarded it as applicable and their Lordships think he was right. It was, however, contended that—apart altogether from what he considered as sufficient corroboration of the commission of murder to satisfy the requirements of the section—he had, in applying the rule of practice, found corroboration where none existed. What he looked upon as corroboration for this purpose appears from the following passages in the judgment: "In the case of "*Rex* v. *John* (1) to which I have just referred, it was said "that the rule of practice may in the absence of direct evidence "be satisfied in various ways, inter alia, by the non-denial "by the accused of the evidence given by the accomplices "incriminating the accused, or by the giving of false evidence. "The court must exercise the same great care, if not greater "care, in considering the evidence tending to incriminate "the accused as it does when considering the evidence relating "to the commission of the crime. It was with these principles "in mind that the court has approached the questions to be "determined in this case and they are most serious ones as "far as the accused are concerned." And later: "In "addition to the evidence of the two accomplices incriminating "all the accused, there is evidence that all the accused attended "the feast as the accomplices said they did. None of the "accused has given evidence denying taking part in the murder. "If they were innocent is it not reasonable to suppose that "they would have given evidence under oath and said so?" This last passage is not quite accurate, as there was no other evidence that appellant No. 3 was at the feast, and appellant No. 2, as mentioned above, had in fact given evidence on oath denying the charge. These slips are, however, of minor importance in the circumstances. What matters is whether the learned judge was right in treating as corroborative the points thus relied on. As regards the Christmas Day feast, their Lordships cannot accept the view that the attendance of the appellants, or most of them, thereat afforded any corroboration of the kind required. It was, by its nature, an event calculated to attract, and it did attract, others beside the appellants who were there, and the mere fact of attendance is no sufficient link with a crime alleged to have occurred after the festivities were over and at some distance from the hut where they had been held.

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(1) S. A. L. R. [1943] T. P. D. 295.

The circumstances that the appellants (other than No. 2) elected not to give evidence is equally incapable of constituting corroboration, though on more general grounds. Silence on the part of an accused person which is tantamount to an admission by conduct may, on occasion, amount to corroboration. But an accused admits nothing by exercising at his trial the right which the law gives him of electing not to deny the charge on oath. Silence of that kind—and it is the only kind relevant to this appeal—affords no corroboration to satisfy the rule of practice under consideration. Nor does an accused corroborate an accomplice merely by giving evidence which is not accepted and must therefore be regarded as false. Corroboration may well be found in the evidence of an accused person; but that is a different matter, for there confirmation comes, if at all, from what is said, and not from the falsity of what is said. It is, of course, correct to say that these circumstances—the failure to give evidence or the giving of false evidence—may bear against an accused and assist in his conviction if there is other material sufficient to sustain a verdict against him. But if the other material is insufficient either in its quality or extent they cannot be used as a makeweight. To hold otherwise would be to undermine the presumption of innocence in a manner as repugnant to the Proclamation of 1938 as to the common law of England.

For these reasons their Lordships are of opinion that the learned judge misdirected himself as to the nature of the corroboration required by the rule of practice which he was obviously endeavouring to apply. As has frequently been pointed out, the functions of this Board in criminal cases are not those of a court of criminal appeal and grounds of appeal going to the weight of evidence are not readily entertained. In the present instance, however, their Lordships feel that the question under discussion stands on a special footing. There was no proper corroboration of any material part of the evidence of the accomplices which, in itself, was not by any means free from blemish. Before accepting that evidence the learned judge sought corroboration and found it in circumstances which, as already held, ought not to have been regarded for the purpose, and it cannot be assumed that he would have arrived at the same conclusion had he directed himself correctly. Indeed, the terms of the judgment go some way to suggest that he would not have disregarded the cautionary rule of practice had he held, as he should, that its requirements were not fulfilled. In the circumstances their Lordships are disposed to treat the misdirection as a matter of grave consequence and would, were it necessary to do so, advise that the appeal be allowed on this ground also.

Before leaving this aspect of the case their Lordships desire to refer to a sentence in the judgment of the learned judge which reads: "It has been frequently laid down that the "evidence of one accomplice is corroborative of the evidence "of another so far as the commission of the crime is concerned." From its context it would seem that this passage was intended to refer to the requirements of the proviso to s. 231. So understood it has already been dealt with. But, lest it might be taken as referring to the rule of practice just discussed, their Lordships think it well to state plainly that for the purposes of that rule the evidence of one accomplice is not corroborative of the evidence of another.

The remaining matter for consideration concerns the administrative officer, Mr. Driver, who in company with a native assessor sat with Grindley-Ferris J. at the trial. His conduct, according to the appellants, "constituted so grave "a departure from the due and orderly administration of "justice that its consequence is to vitiate the trial and "judgment." Before coming to the detail of this complaint it will be convenient to refer to the provisions under which Mr. Driver was appointed to sit. By s. 7 of Proclamation No. 57 of 1938, as amended by s. 1 of Proclamation No. 41 of 1942, it is provided that: "7. If the judge shall so direct, "any trial civil or criminal may be held and any appeal heard "with the aid of not more than two administrative officers "to be appointed for that purpose by the resident commissioner "by notice in the Gazette for such sittings of the court as "may be specified in that notice.

"It shall be the duty of such officer or officers to give, "either in open court or otherwise, such assistance and advice "as the judge may require, but the decision shall be vested "exclusively in the judge. The agreement or disagreement "of such officer or officers with the decision of the judge "shall be noted on the record."

Before the amendment of 1942 it was necessary that the opinion of the administrative officer should be given in open court. See the decision of this Board in *Mahlikilili Dhalamini*

v. *The King* (1). It is material to observe that under s. 7, as amended, the assistance and advice of the officer may be given "in open court or otherwise," an expression which their Lordships think wide enough to authorize the giving of such assistance and advice in private. The complaint against Mr. Driver was raised after the trial and the allegations made are not entirely agreed. Mr. Driver has, however, sworn an affidavit for the information of the Board and their Lordships are content to take the facts as therein appearing. The affidavit reads as follows :—

"During my tour on Circuit at Qacha's Nek in August, "1947, I learnt that Tumahole Bereng and others had been "indicted by the Attorney-General on a charge of (ritual) "murder. As it had been customary for the Resident "Commissioner to appoint me under the provisions of "s. 7 of Proclamation No. 57 of 1938 as amended by s. 1 "of Proclamation No. 41 of 1942 to assist the judge of the "High Court at the High Court sessions, I anticipated my "appointment for the next session and I therefore made "inquiries with the object of visiting the scene of the crime "so that I would have a better understanding of the "testimony of the witnesses called to testify at the trial. "I learnt that the Superintendent of Police at Qacha's Nek, "Major G. H. Cockerell, was proceeding to the scene of "crime on Monday, August 18, to draw up a plan on the orders "of the Attorney-General to be produced in evidence "at the trial and decided with his permission to accompany "him and his staff. Two of my staff also accompanied us, "viz., my interpreter and assessor.

"We all proceeded to the hut of No. 2 accused, Gladstone "Phatela. On arrival, the Superintendent of Police "requested permission of the wife and (*sic*) No. 2 accused "to enter the hut. To the best of my recollection I did "not repeat the request to enter the hut. The wife agreed "and the Superintendent of Police and I entered. I made "notes of the size and contents of the hut.

"The party then went out of the hut and the Crown "witness Jan Gat was called to point out the route taken "by himself and the accused on the night of the murder. "I had not read the Record at that stage so had no idea "of the evidence given by Jan Gat at the preparatory "examination.

"When we got near the cattle kraal the Superintendent

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(1) [1942] A. C. 583.

"of Police who had prosecuted at the Preparatory "Examination reminded Jan Gat of his evidence at the preparatory examination, where he had described the route taken "on the night of the murder as running between the kraal "and the hut and asked him to follow that route. This "request was no doubt made as that was the starting point. "Gat did so and we followed him. He then proceeded on "a path leading up the side of the hill and later diverted "southwards and upwards and took us on to the plateau "and onwards to the place where he thought the live body "had been placed and bled (and probably killed). The "other accomplice Maama was never with us when the "Superintendent of Police and I followed Gat. He was "behind with my staff. From the place where the deceased "was probably killed on the plateau behind No. 2's huts, "Gat led us down to another point where he said the body "had fallen from their hands while being carried to the "stream where it was eventually found. He then led us "further to the point where he said the body had been "thrown over the cliff into the stream below.

"At this point (stream) after the Superintendent had "taken photographs and he and I had measured distances "from the normal well worn path, etc., I asked Gat numerous "questions about the manner in which they had carried "the body and eventually thrown it over the cliff.

"None of these questions were questions which were not "asked in evidence at the trial by the prosecuting counsel, "elicited by the defence, in cross-examination of Jan Gat "or Maama or by the bench.

"The indications about the route taken, etc., were all "shown the Superintendent and myself by Jan Gat and at "no stage to the best of my recollection did I direct any "questions to Maama."

It may be stated at once that Mr. Driver's good faith was not impugned by the appellants and that their Lordships have no reason to think that in acting as he did he was moved by anything more than a desire to prepare himself for the duty he then anticipated. His action was none the less most unfortunate and his subsequent participation in the trial highly irregular. The burden of this complaint does not lie in the fact that Mr. Driver came to court with a knowledge of the physical features of the terrain; it lies in the fact that before the trial, and in the absence of the appellants

J. C.
1949
Tumahole Bereng v. The King.

or their representatives, he had acquainted himself with certain material aspects of the Crown case in the company of a number of Crown witnesses and had interrogated Jan Gat regarding several important aspects of his evidence. As has been so often said, justice must not only be done but must manifestly be seen to be done. In their Lordships' opinion Mr. Driver's conduct was such as to cause doubt in the public mind as to the complete impartiality of the proceedings in which he subsequently took part. As counsel for the Crown said when dealing with this aspect of the case, it has not been shown that what Mr. Driver did before the trial prejudiced the appellants. But it might well have been thought, when his activity became known, that he had come to court with a biased mind in the sense of having formed a definite view as to what had occurred or as to the credibility of the witnesses whom he had observed or questioned. It might also have been thought that he had been told more than could be legally proved, or that his interrogation of an accomplice might have had an effect on the story as told by that witness afterwards at the trial. All this, of course, is in the realm of conjecture, but where the irregularity complained of may reasonably engender suspicions of this nature it cannot be left out of account, particularly when, as here, the opinion of the officer could have been communicated to the judge in private. In the case of *Mahlikilili Dhalamini* v. *The King* (1) to which reference has already been made, Lord Atkin, delivering the judgment of the Board, said: "Prima facie, the failure "to hold the whole of the proceedings in public must amount "to such a disregard of the forms of justice as to lead to "substantial and grave injustice within the rule adopted by "this Board in dealing with criminal appeals." In the opinion of their Lordships the same may well be said of the irregularity under consideration. In the circumstances, and in view of what has already been said regarding the appeal in its other aspects, it is unnecessary to add more save to express the hope that the observations of their Lordships may serve to prevent the recurrence of such a procedure.

For the reasons appearing above their Lordships have, as already intimated to the parties, humbly advised His Majesty that the appeal should be allowed and the convictions set aside.

Solicitors for appellants: *Jaques & Co.*
Solicitors for respondent: *Burchells.*

(1) [1942] A. C. 583, 590.

[HOUSE OF LORDS]

H. L. (Sc.)*

1948
Dec. 6, 7.
1949
Jan. 20.

GALASHIELS GAS CO., LD. . . . APPELLANTS;

AND

O'DONNELL OR MILLAR . . . RESPONDENT.

Factory Acts—Maintenance—Hoists and lifts—Inexplicable failure of mechanism—Statutory duty—Factories Act, 1937 (1 *Edw.* 8 *and* 1 *Geo.* 6, *c.* 67) *s.* 22, *sub-s.* 1, *s.* 152, *sub-s.* 1.

By the Factories Act, 1937, s. 22, sub-s. 1: "Every hoist or "lift shall be of good mechanical construction, sound material "and adequate strength, and be properly maintained." By s. 152, sub-s. 1, the expression "maintained" means "maintained "in an efficient state, in efficient working order and in good "repair."

By s. 22, sub-s. 1, an absolute and continuing obligation is imposed, so that proof of any failure in the mechanism of a hoist or lift establishes a breach of the statutory duty, even though it was impossible to anticipate that failure before the event or to explain it afterwards and even though all reasonable steps have been taken to provide a suitable hoist or lift and to maintain it properly.

Decision of the Second Division of the Court of Session (sub nom. *Millar* v. *Galashiels Gas Co., Ld.*) 1948 S. L. T. 282, affirmed.

APPEAL from the Second Division of the Court of Session.

The facts, stated by Lord Reid, were as follows: The pursuer and respondent was the widow of George Danse Millar who died as a result of injuries sustained while working as a stoker in the gas works of the defenders and appellants. Coke was discharged from retorts on the ground floor of the gas works into bogies each of which held about 15 cwt. When each bogie was filled it was run into a lift, taken up to the first floor, run out of the lift along a gantry to a point where it was emptied into a screening plant, then run back into the lift and brought down to be refilled. At about 9 p.m. on October 1, 1945, the deceased George Millar was engaged in this work. He took a full bogie up in the lift and some time later he was found seriously injured lying with an empty bogie at the bottom of the lift shaft, and the lift was found to be at the top of the lift shaft. He died on the following day as a result of these injuries. The lift was electrically operated. There were gates on the lift and also gates at each floor level. The electric circuit of the power which operated the lift ran through these gates so that if any one of the gates was open the circuit was broken and the power could not be applied. The lift was attached to wire ropes which passed over a hoist drum at the top of the shaft to a counter balance weight which moved up as the lift moved down, and down as the lift moved up. Power was applied to rotate the hoist drum and so to move the lift up or down according to the direction of rotation of the drum. When power was not being applied the drum was held by a brake. The brake shoes were held against the drum by strong springs and the brake could only be taken off by withdrawing the shoes against the pressure of the springs. The force necessary to withdraw the brake shoes was provided by a solenoid which was part of the electric power circuit. When this circuit was closed the flow of the power current magnetized the solenoid with the result that a plunger attached to the brake shoes was moved by magnetic force so as to withdraw the brake shoes from the hoist drum against the pressure of the springs. The hoist drum was then free to rotate. Immediately the power current ceased to flow the solenoid was demagnetized and the pressure of the springs forced the brake shoes back into position against the hoist drum so that it could not rotate and therefore the lift could not move. Accordingly if this mechanism was in efficient working order, it was impossible for the lift to move while any one of the gates was open. What must have happened immediately before the accident to the deceased George Millar was this: Millar switched off the power with the lever in the lift cage when he reached the first floor and then opened the gates. He then ran the bogie out to the point of discharge, leaving the gates open; he then emptied the bogie, and ran it back to the lift shaft. By this time the lift cage had moved upwards in the shaft. Millar did not see that this had happened and ran the bogie into the lift shaft. The lift not being in place he and the bogie fell to the bottom of the shaft. It was not maintained on this appeal that Millar was guilty of contributory negligence in doing this. Immediately after Millar was found the lift was examined. It was found that the liftway gates on the first floor were open and that the lift was at the top of the shaft. The hoist drum and brake shoes were examined but not touched. It was seen that the brake shoes were not gripping the hoist drum: they had not returned to their proper position when Millar switched off the power current in stopping the lift at the first floor. The counterbalance weight was heavier than the empty lift cage and in the absence of a brake this difference of weight moved the lift up and away from the first floor while Millar was unloading the bogie. The next day the appellants asked a firm of lift engineers to carry out a thorough examination. The fitters who were sent to do this found that, although the current was off, the solenoid plunger had remained in the "energized" position and therefore the brake shoes were clear of the hoist drum. As soon as one of the fitters touched the plunger it moved to the off position and the brake shoes gripped the drum. Every effort was made to find out what had caused the plunger to stick when the solenoid was demagnetized. The whole mechanism was dismantled and carefully examined but nothing was found to account for the failure. The mechanism was then reassembled and it worked perfectly. It had continued to work perfectly since the accident and no repairs or renewals had been necessary. For at least nine years before the accident the brake had never been known to fail on any occasion. No satisfactory explanation of this isolated failure had since been found.

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* *Present:* LORD NORMAND, LORD MORTON OF HENRYTON, LORD MACDERMOTT and LORD REID.

In this action the respondent claimed damages relying alternatively on breach of the statutory duty imposed by s. 22 of the Factories Act, 1937, and on negligence at common law. The Lord Ordinary (Lord Blades) awarded her 1,000*l.* damages, holding that the appellants were in breach of the absolute duty laid on them by the Act, and negativing contributory negligence on the part of the deceased. The Second Division of the Court of Session (Lord Justice-Clerk Thomson, Lord Jamieson and Lord Stevenson, Lord Mackay dissenting) affirmed his interlocutor. The appellants appealed to the House of Lords.

Guest K.C. and *J. O. M. Hunter* (both of the English and the Scottish Bars) for the appellants. The accident was not caused by any breach of the statutory duty imposed by s. 22 of the Factories Act, 1937. The respondent has failed to establish any fault under the section; according to the Lord Ordinary's statement of the facts, the appellants have proved positively their absolute and exact compliance with s. 22, sub-s. 1. The respondent's contentions, if upheld, would go further than any decided case affecting the safety of workmen and beyond the words of the section. Such a decision would make the employers, in a case like this, insurers. No decided case has imposed such a duty: see *Caswell* v. *Powell Duffryn Associated Collieries Ld.* (1), where the view was expressly disclaimed, and *Lewis* v. *Denye* (2). Taken with the definition of "maintained" in s. 152, sub-s. 1, it is clear that s. 22, sub-s. 1, imposes a duty of proper maintenance. The use of the adverb "properly" in s. 22, sub-s. 1, indicates that the obligation is limited to something less than an absolute standard. It must be held to have some effect and if the section without it imposed an absolute duty its inclusion could not increase the obligation and so must reduce it. The word "maintained" does not connote the continuance of a state but rather is akin to "serviced," "looked after" or "attended "to." Where the legislature means "kept" it uses that word, see s. 1: see also s. 7, sub-s. 1, and s. 16 ("maintained "and kept"). In s. 13, sub-s. 2, "maintained" is used and in ss. 24 and 25 "properly maintained." The provisions of s. 22, sub-s. 4, support the appellants' interpretation. The statutory duty is to take such active steps as will ensure that the lift is in efficient working order, and if the appellants have done all that was reasonable and proper to maintain the mechanism they are not in breach of that duty. The requirement is not that the lift shall always be in efficient working order but that all necessary steps must be taken to ensure that it is so. The respondent cannot succeed unless she can point to some particular step which the appellants omitted to take and which would have prevented the accident. She must show the nature of the defect which prevented the lift from being in efficient working order. If she cannot specify any step which could have been taken by the appellants to avoid the accident she cannot establish a breach of the statutory duty. Here, on the findings of the Lord Ordinary (3), she can point to no step which the appellants could have taken to prevent the accident and has not proved any specific cause for the failure of the brake. That failure remains an unexplained mystery. Merely to show that on this isolated occasion, for some unascertained cause, the lift did not work properly does not establish a breach of the statutory obligation,

(1) [1940] A. C. 152, 164.
(2) [1940] A. C. 921, 930.
(3) 1948 S. L. T. 282, 284-5.

for the obligation imposed is not that the lift shall work on every occasion; that would be impossible of fulfilment. An employer has never been held liable under the Factory Acts for something which he could not have prevented. It is admitted that the appellants' duty under s. 22, sub-s. 1, goes beyond a duty to take care and an employer would be liable in damages even where there was a latent defect which could not have been discovered before the accident by examination of the defective part of the mechanism or by any examination such as a reasonable man would undertake. The distinction between such a case as that and the present case is that there it would have been physically possible to prevent the accident while here, since no one discovered the cause of the accident, the respondent cannot show how it could have been prevented and so cannot establish any breach of duty by the appellants. It is also admitted that the appellants' duty of compliance with s. 22, sub-s. 1, was absolute in the sense that it could not be delegated, that no defence of common employment would be open and that contributory negligence would be a defence only if it were of a gross character. The duty to comply is absolute but the obligation imposed is not expressed in absolute terms. The question therefore remains: What is the duty? The answer is that it is proper maintenance and unless the respondent can put her finger on some point of improper maintenance she must fail. The only alternative is the view that the lift must be in efficient working order at all periods, imposing an impossible liability and a duty which could not possibly be performed. *Smith* v. *Cammell Laird & Co., Ld.* (1); *Riddell* v. *Reid* (2) and *Callaghan* v. *Fred Kidd & Son (Engineers), Ld.* (3), are distinguishable in the light of the precise terms of the statutory provisions there applicable. In *Smith* v. *Cammell Laird & Co., Ld.* (1), the word "properly" is absent from the statutory provision dealt with. Moreover the reference by Lord Atkin (4) to "a specified activity" means that the pursuer must specify the act the doing or neglect of which made the plant not safe. *Riddell* v. *Reid* (2) was decided under a statutory provision which expressed a prohibition in unqualified terms and which could accurately be described as "continuing" in the sense that it continued to be applicable as a prohibition at any given moment.

(1) [1940] A. C. 242.
(2) [1943] A. C. 1.
(3) [1944] K. B. 560.
(4) [1940] A. C. 242, 258.

H. L. (Sc.)

1948

Galashiels Gas Co., Ld. *v.* O'Donnell or Millar.

"Continuing" as an adjective applied to a duty of proper maintenance of machinery involves a contradiction unless it is used in a somewhat different sense from that in which it was used in that case. Maintenance of machinery involves active steps which can only take place at intervals. The duty to maintain is continuing in the sense that there must be regular maintenance, but to say that any failure of the lift to work at any time results in liability per se without further proof would be to alter the language of the provision and impose a much higher duty than that intended by the legislature. The observations in *Lochgelly Iron & Coal Co., Ld.* v. *M'Mullan* (1) cited in *Riddell* v. *Reid* (2) support the appellants' case. *Cole* v. *Blackstone & Co., Ld.* (3), is the only case where the words "properly maintained" have been the subject of decision but it is distinguishable on the facts because there the cause of the failure was ascertained and the employers could have remedied the state of affairs if they had carried out an inspection. Alternatively it was wrongly decided. *Reilly* v. *William Beardmore & Co., Ld.* (4) supports the view that a pursuer who bases his case on breach of a statutory duty cannot succeed merely on proof that an accident occurred and that the accident was due to a failure of machinery for which the employer was responsible. *Carroll* v. *Andrew Barclay & Sons, Ld.* (5) shows that in construing the Factory Acts, if there are two possible constructions the court will lean to the narrower meaning unless it is obliged to adopt the broader and that it will have regard to the practical results of the constructions suggested.

Lord Normand intimated that their Lordships desired to hear the respondent's submissions on the meaning and effect of the word "properly" in s. 22, sub-s. 1, but not on any other matter.

Walker K.C. and *R. S. Johnston* (both of the Scottish Bar) for the respondent. If the word "properly" were not in s. 22, sub-s. 1, it would make no difference to its construction. Its insertion serves no purpose of changing the sense. The word "maintain" imposes an absolute obligation and the addition of "properly" does not lessen it; it is not incom-

(1) [1934] A. C. 1, 13.
(2) [1943] A. C. 1, 10.
(3) [1943] K. B. 615.
(4) 1947 S. C. 275.
(5) [1948] A. C. 477.

patible with an absolute duty. The quality of the duty is not affected by an additional obligation to discharge it in a proper manner. The word " properly " may have been intended to point to the matters set out in the definition in s. 152, sub-s. 1, of the word " maintained." The use of the phrases " constantly maintained " in s. 16, and " maintained safe " in s. 26, sub-s. 1, supports the respondent's contentions. The breach of the duty to maintain is established simply by proving that the brake was not in efficient working order at the time of the accident.

Guest K.C. in reply. The use of the phrase " so far as is " reasonably practicable " in s. 22, sub-s. 4, supports the appellants' contentions. In s. 22, sub-s. 1, the word " properly" must serve a purpose. It contrasts with the cases where " maintained " is used without qualification.

The House took time for consideration.

Jan. 20, 1949. LORD NORMAND. My Lords, I have had the advantage of reading in print the speeches which my noble and learned friends are about to deliver, and I find myself in complete agreement with them. The facts will be dealt with by my noble and learned friend, Lord Reid. I desire only to emphasize that no new principle and no extension of any principle already recognized is involved in the conclusion that the appellants are liable to the respondent for breach of the duty imposed on them by s. 22, sub-s. 1, of the Factories Act, 1937. The only question of law in the case is the proper construction of the obligation imposed by s. 22, sub-s. 1, as controlled by the definition of " maintained " in s. 152, sub-s. 1, and on that I wish to add nothing.

LORD MORTON OF HENRYTON. My Lords, s. 22, sub-s. 1, of the Factories Act, 1937, is in the following terms : "Every " hoist or lift shall be of good mechanical construction, sound " material and adequate strength, and be properly main- " tained." The statutory duty which, it is alleged, the appellants have failed to discharge is contained in the words, " Every hoist or lift shall be properly maintained " in s. 22, sub-s. 1, read in conjunction with the definition of " maintained " in s. 152, sub-s. 1 : " ' Maintained ' means maintained in an " efficient state, in efficient working order, and in good " repair." I think there can be no doubt that this sub-section imposes a continuous obligation on the appellants. I shall shortly consider the precise nature of that obligation. Equally there can be no doubt, in view of the Lord Ordinary's findings of fact, that the brake of the lift in question was not in efficient working order at the time when the accident happened, though it would appear to have worked efficiently during the periods before and after the accident.

The contention of the respondent, which has so far succeeded, is that she has established a breach of statutory duty by the appellants simply by proving that the brake was not in efficient working order at that time. If this contention is sound, the appeal must fail, for contributory negligence by the deceased workman has been negatived, and there can be no doubt that the failure of the brake to operate efficiently caused the death of the deceased.

The appellants contend that no breach of statutory duty has been proved. They contend that their statutory duty is to take such active steps as will ensure that the lift is in efficient working order, and that the respondent cannot succeed unless she can point to some particular step which the appellants omitted to take and which would have prevented the accident. They say truly that the respondent cannot point to any such step, and failed to prove any specific cause for the failure of the brake to operate. They rely strongly upon the following passages in the judgment of the Lord Ordinary (1): "I am "satisfied that the defenders took every practical step to "ensure that the lift mechanism worked properly and was "safe to use. I am equally satisfied that the failure of the "brake was one which, apparently, nobody could have "anticipated or, after the event, explain. . . . That the "defenders took all reasonable steps to provide a suitable "lift and to maintain it properly is to my mind established "beyond doubt."

My Lords, in my view the Lord Ordinary supplied the correct answer to the whole of this argument when he said (2): "In my opinion . . . . there is imposed on the defenders "an absolute and continuing obligation binding upon them "which is not discharged if at any time their lift mechanism, "in this case the brake, is not maintained in an efficient "state, in efficient working order, and in good repair." The words of the sub-section are imperative "shall be properly "maintained" and I can find nothing in the context or in the general intention of the Act, read as a whole, which should lead your Lordships to infer any qualification upon that absolute obligation. It is quite true that the sub-section, so read, imposes a heavy burden upon employers, but the object of this group of sections is to protect the workman. I think the sub-section must have been so worded in order to relieve the injured workman from the burden of proving that there was some particular step which the employers could have taken and did not take. This would often be a difficult matter, more especially if the cause of the failure of the mechanism to operate could not be ascertained. The statute renders the task of the injured workman easier by saying, "You "need only prove that the mechanism failed to work efficiently "and that this failure caused the accident."

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(1) 1948 S. L. T. 282, 284-5.

(2) Ibid. 284.

Counsel for the appellants contended that a decision against his clients "would go further than any decided case." I do not agree, but even if I did agree, I should not be unduly perturbed. Your Lordships were not referred to any decision on this particular sub-section, but there are other statutory provisions for the protection of workmen which have been held to impose an absolute and continuing obligation upon employers. See for instance: *Smith* v. *Cammell Laird & Co. Ld.* (1); *Riddell* v. *Reid* (2); *Carroll* v. *Andrew Barclay & Sons, Ld.* (3). In the last-mentioned case this House had to decide a question as to the nature of the fencing which was required under s. 13, sub-s. 1, of the Factories Act, 1937, but no member of the House doubted that the obligation as to fencing was absolute and continuous. Lord Normand observed (4): "The sub-section imposes an absolute obligation in the sense "that the obligation, whatever its meaning and effect, must "be actually fulfilled and not merely that the occupier of "the factory must do his best to fulfil it."

Counsel for the appellants relied upon the word "properly" in s. 22, sub-s. 1, and contended that the presence of this word indicates that the obligation of the employers is limited. I cannot agree. If the word "maintain" alone imposes upon the employers the absolute obligation, I cannot see that the addition of the word "properly" can lessen their obligation. In the case of *Cole* v. *Blackstone & Co., Ld.* (5) Macnaghten J. had to consider s. 25, sub-s. 4, of the same Act which provides, "all ladders shall be soundly constructed

(1) [1940] A. C. 242.
(2) [1943] A. C. 1.
(3) [1948] A. C. 477.
(4) Ibid. 487.
(5) [1943] K. B. 615.

"and properly maintained." The facts were that when a workman named Cole was ascending a ladder a rung gave way, with the result that he fell to the ground and received injuries from which he died. The ladder was subsequently taken to pieces and examined. The strings were made of deal and the rungs of coppice oak, and both the strings and all the rungs, including that which had given way, were found to be in perfect condition. The rungs were screwed to the strings with three-inch steel screws, and it was found that the screws holding the rung which had given way had broken in half at a point between the rung and the string and that the fractures were due to corrosion. All the other screws were in perfect condition. A few weeks before the accident happened the ladder had been inspected by a "safety first" committee appointed by the defendants, to which the workmen elected their own representatives, and nothing had been found requiring attention. Cole, who used the ladder several times a day, had never made any complaint about it. Cole's widow was successful in an action alleging breach of the statutory obligation imposed by s. 25, sub-s. 4, and Macnaghten J. said, in regard to the words "properly maintained" (1): "Mr. Marshall, for the defendants, submitted that the statutory "duty to keep the ladder in an efficient state and in good "repair is not an absolute duty, and that the words of the Act "must be qualified to this extent that, if the employer took "all reasonable steps to see that the ladder was in an efficient "state and in good repair, he would have discharged his duty. "In support of this contention he relied on the observations "of Lord Wright in *Wilsons & Clyde Coal Co., Ld.* v. *English* (2), "while Mr. Dixon, on the other hand, relied on the observations "made in *Riddell* v. *Reid* (3). I see no ground for qualifying "the words of s. 25, sub-s. 4, of the Factories Act, 1937. "The duty to keep all ladders in an efficient state and in good "repair appears to me to be as absolute as the duty imposed "by the Act to fence all dangerous parts of machinery. It "is true that the defendants took great care for the safety "of their men, and that this particular failure was one which, "apparently, nobody could have anticipated." Later, the learned judge added: "The ladder was not in fact in an "efficient state or in good repair on the morning of the "accident. The plaintiff, therefore, is entitled to recover

(1) [1943] K. B. 617.
(2) [1938] A. C. 57.
(3) [1943] A. C. 1.

"compensation." I agree with the reasoning and with the conclusion of Macnaghten J., and in my view a similar construction should be placed on the same phrase "properly "maintained" where it appears in s. 22, sub-s. 1. I have carefully considered all the other sections of the Act which were mentioned in the course of the argument on the present appeal, but I can find nothing in them which throws doubt upon this view.

Counsel sought to rely upon the observation of Lord Atkin in *Caswell* v. *Powell Duffryn Associated Collieries Ld.* (1): "The statute does not in terms create a statutory cause of "action. It does not, for instance, make the employer an "insurer." That observation does not assist the appellants, when read in its context. Lord Atkin went on to say: "The "person who is injured, as in all cases where damage is the gist "of the action, must show not only a breach of duty but that "his hurt was due to the breach." So in the present case the respondent would have failed in her action if the Lord Ordinary had held that there was a breach of duty, but that such breach of duty was not the cause of the fatal accident.

Finally, counsel sought to derive assistance from certain observations of the Lord President in the case of *Reilly* v. *William Beardmore & Co., Ld.* (2). In that case the First Division had to consider s. 23, sub-s. 1 (*a*) of the Act, which provides, "No chain, rope or lifting tackle shall be used "unless it is of good construction, sound material, adequate "strength and free from patent defect." The last five words are not present in the section now under consideration, and in my view the Lord President's observations, properly construed, contain nothing which is inconsistent with the views which I have already expressed as to the absolute duty imposed by s. 22, sub-s. 1.

For these reasons, which are in substance the same as the reasons advanced by the majority of the Second Division of the Court of Session, I would dismiss the appeal.

LORD MACDERMOTT. My Lords, but two questions remain for determination in this appeal. The first is as to the nature of the duty imposed by sub-s. 1 of s. 22 of the Factories Act, 1937; the second is whether the respondent has proved a breach of the duty arising under that sub-section. Section 22, sub-s. 1, of the Act of 1937 reads thus: "Every hoist or lift

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(1) [1940] A. C. 152, 164.

(2) 1947 S. C. 275.

"shall be of good mechanical construction, sound material "and adequate strength, and be properly maintained." To this must be added the following definition from s. 152, sub-s. 1: "'Maintained' means maintained in an efficient "state, in efficient working order, and in good repair." Leaving out of these provisions the words which are not immediately material the terms of the obligation are: "Every . . . . lift shall be . . . . properly maintained . . . "in efficient working order. . . . ."

My Lords, if this means that every lift shall be kept continuously—or at least while it is available for use as a lift—in efficient working order the nature of the obligation is clear. It then falls into a category long recognized and firmly established by authority; it is a strict or absolute duty and neither intention nor lack of care need be shown in order to prove a breach of it. This was not, indeed, disputed; but Mr. Guest, on behalf of the appellants, submitted that on the true construction of the sub-section such was not its meaning. He contended that, in this context, "maintained" did not connote the continuance of a state and he relied upon the adverb "properly" as introducing something less than an absolute standard. If, he said, the appellants had done all that was reasonable and proper to "maintain" the lift and its mechanism they had not fallen short of what the statute requires.

My Lords, the word "maintain" when used in relation to the state or condition of things is not always used in the same sense. It may be used to indicate the continuance of a particular state or condition, as when one says of someone that "he maintains his buildings just as they were." But on occasion it takes colour from the work of maintenance and is used in reference to the acts done or requisite to be done in the course of maintenance, as when one says of another that "he maintains his buildings methodically." This latter use gives the word "maintained" in relation to machinery rather the meaning of "serviced" or "looked after" or "attended to"—I doubt if there is an exact synonym—and it was in this sense, according to the appellants' argument, that the word ought to be read in s. 22, sub-s. 1. If that argument prevails the appeal should succeed, as the Lord Ordinary has found (1) that the appellants took "every "practical step to ensure that the lift mechanism worked

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(1) 1948 S. L. T. 282, 284.

H. L. (Sc.)

1949

GALASHIELS GAS CO., LD. *v.* O'DONNELL OR MILLAR.

Lord MacDermott.

"properly and was safe to use," and, again, that "the failure "of the brake was one which, apparently, nobody could have "anticipated or, after the event, explain."

My Lords, had the legislature thought fit not to define "maintained" Mr. Guest's submission on this aspect of the case would have encountered less difficulty. But when the terms of the definition are regarded the meaning for which he has contended is, in my opinion, at once displaced. To my mind they indicate conclusively that in s. 22, sub-s. 1, "maintained" is employed to denote the *continuance* of a state of working efficiency. In the ordinary use of language one cannot be said to maintain a piece of machinery in efficient working order over a given period if, on occasion within that period, the machinery, whatever the reason, is not in efficient working order. In short, the definition describes a result to be achieved rather than the means of achieving it. I do not think the use of the word "properly" weakens or detracts from the compelling effect of this definition. Why exactly "properly" was inserted is perhaps a matter of speculation, as the Act does not appear to furnish any very obvious explanation. But, however this may be, the word is certainly not incompatible with the duty in question being absolute in character. There may be more than one way of discharging such a duty and I do not see that the quality of the duty need be affected by an additional obligation to discharge it in a proper manner.

I turn now to the second question. Did the respondent prove the breach alleged? The point made against her was that she had failed to do so because the cause of the failure in the lift mechanism had not been discovered and remains a mystery. In my opinion this point has no substance. There was abundant proof that the mechanism had failed and that that failure resulted in the death of the respondent's husband. Once the absolute nature of the duty imposed by the statute is established, that is proof enough. The obligation was to have the lift "in efficient working order" at the time of the accident, as well as at other times, and the breach of that obligation has been clearly shown.

For these reasons I am of opinion that the view taken by the courts in Scotland was right. I would therefore affirm the interlocutors and dismiss the appeal.

H. L. (Sc.)

1949

Galashiels Gas Co., Ld. v. O'Donnell or Millar.

Lord Reid. My Lords, I agree with the Lord Ordinary in saying (1): "I am satisfied that the defenders took every "practical step to ensure that the lift mechanism worked "properly and was safe to use. I am equally satisfied that "the failure of the brake was one which, apparently, nobody "could have anticipated or, after the event, explain."

The question at issue in this case is the nature and extent of the duty imposed on employers by s. 22, sub-s. 1, of the Factories Act, 1937. That sub-section requires that "every "hoist or lift shall be of good mechanical construction, sound "material and adequate strength, and be properly main-"tained." The word "maintained" is defined in s. 152 as meaning "maintained in an efficient state, in efficient working "order, and in good repair." It has been held by the Lord Ordinary and by the learned judges of the Second Division, Lord Mackay dissenting, that this section imposed upon the appellants an absolute duty to have the lift in efficient working order, that the accident was caused by its not being in efficient working order, and that therefore the respondent is entitled to damages.

The appellants' case is that s. 22, sub-s. 1, of the Act does not impose an absolute duty to keep lifts in efficient working order and that a pursuer cannot succeed without averring and proving the nature of the defect which prevented the lift from being in efficient working order. It was argued that the requirement is not that the lift shall be in efficient working order but that the employer shall take all necessary steps to ensure that it is so, and therefore that a pursuer must show what it was that the employer could have done to prevent the accident but did not do. But it is clear, as the appellants' counsel properly admitted, that the employer's duty under the section goes beyond a duty to take care. It was admitted that the employer is liable in damages where the defect could not have been discovered before the accident by any examination which any reasonable man would have undertaken and even where the defect was a latent defect which could not have been discovered by examination before the accident of the defective part of the mechanism. In such cases it would have been physically possible to prevent the accident. In the present case, as no one has discovered the cause of the defect, the respondent cannot show whether or how the accident could

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(1) 1948 S. L. T. 282, 284.

H. L. (Sc.)

1949

Galashiels Gas Co., Ld. v. O'Donnell or Millar.

Lord Reid.

have been prevented, and therefore, it is said, cannot establish any breach of duty by the appellants.

My Lords, I can understand a duty to exercise a high decree of care and I can understand an absolute duty under which the mere fact that a machine is not in efficient working order entails liability if that is the cause of injury to a workman, but I find it hard to understand the nature of a duty which falls short of an absolute duty but yet cannot be discharged even by the highest degree of care, and equally hard to understand what practical object could be achieved by enacting a duty of this character. The result would be that the pursuer would have to undertake an investigation of the precise nature of the defect which would often be difficult and expensive. Where this investigation was successful it would be no defence for the employer to show that he could not by any exercise of care have prevented the accident. But where this investigation failed, as it did in this case, the employer would be under no liability. I think that clear words would be necessary before it could be held that such was the intention of the legislature.

Much stress was laid by the appellants' counsel on the word "properly" in s. 22, sub-s. 1. It was argued that the introduction of this word must be held to have some effect; that if the section without this word would have imposed an absolute duty the insertion of the word could not increase the obligation on the employer, so it must have been intended to reduce that obligation. "Properly" must refer to the conduct of the employer so that the section requires, not that the mechanism shall always be in efficient working order, but that the employer shall take such active steps as are necessary to ensure that it is in efficient working order. It follows that if a pursuer cannot specify any step which could have been taken by the employer to avoid the accident he cannot show that the employer was in breach of the statutory duty; as the present respondent has not proved the cause of the accident she cannot point to any particular step which could have been taken to avoid it. My Lords, I cannot attribute any such effect to the use of this word. I think that there may be a much simpler explanation of its use. If the definition of "maintained" in s. 152, sub-s. 1, had been written into s. 22, sub-s. 1, there would have been no need to insert the word "properly." The relevant part of the sub-section would then have read: "Every hoist or lift "shall . . . . be maintained in an efficient state, in efficient "working order, and in good repair." But if the definition were not written in and the word "properly" omitted, the result—"every hoist or lift shall be of good mechanical "construction, sound material and adequate strength, and "be maintained"—would have been so bald as to be misleading. I doubt whether the word "properly" was inserted for any purpose beyond rounding off the sentence. In any event it does not appear to me to alter the sense of the sentence. If the duty of proper maintenance and maintenance is defined as maintenance in efficient working order, then, once it is established that the duty goes beyond a duty to exercise care the fact that on a particular occasion the mechanism was not in efficient working order shows that there had not been proper maintenance. Reference was made to a number of sections of the Act where the word "maintained" occurs, and particularly to ss. 24 and 25 where the phrase "properly "maintained" is used but I do not think that a comparison of these sections with s. 22 assists materially the decision of the present case.

A number of previous decisions were canvassed in argument. In *Cole* v. *Blackstone & Co., Ld.* (1), the accident was caused by the rung of a ladder giving way. The rungs were held in place by steel screws. It was found after the accident that all but one of the screws were in good order, but one screw was badly corroded. That screw broke when the injured workman stepped on the rung which it held. The case was laid on a breach of s. 25, sub-s. 4, of the Factories Act, 1937, which provides that "all ladders shall be soundly "constructed and properly maintained." Macnaghten J. having held that the ladder was soundly constructed said (2): "On the question whether the ladder was 'in an efficient "'state' and in 'good repair' on the morning of the accident, "the fact that the rung gave way establishes, to my mind, "beyond question, that the ladder was not in an efficient "state and was not in good repair at that time. Mr. Marshall, "for the defendants, submitted that the statutory duty to "keep the ladder in an efficient state and in good repair is "not an absolute duty, and that the words of the Act must "be qualified to this extent that, if the employer took all "reasonable steps to see that the ladder was in an efficient "state and in good repair, he would have discharged his

(1) [1943] K. B. 615.

(2) Ibid. 616-617.

H. L. (Sc.)

1949

GALASHIELS GAS CO., LD. v. O'DONNELL OR MILLAR.

Lord Reid.

" duty. In support of this contention he relied on the " observations of Lord Wright in *Wilsons & Clyde Coal Co.,* " *Ld.* v. *English* (1), while Mr. Dixon, on the other hand, relied " on the observations made in *Riddell* v. *Reid* (2). I see no " ground for qualifying the words of s. 25, sub-s. 4, of the " Factories Act, 1937. The duty to keep all ladders in an " efficient state and in good repair appears to me to be as " absolute as the duty imposed by the Act to fence all " dangerous parts of machinery." The appellants' counsel sought to displace this interpretation by referring to a number of dicta: he was unable to cite any decision which was inconsistent with it. In *Lewis* v. *Denye* (3), Viscount Simon L.C. quoting from a speech of Lord Atkin in an earlier case, (*Caswell* v. *Powell Duffryn Associated Collieries Ld.* (4)), said: " The " statute does not in terms create a statutory cause of action. " It does not, for instance, make the employer an insurer. " The person who is injured, as in all cases where damage " is the gist of the action, must show not only a breach of duty " but that his hurt was due to the breach." That does not appear to me to help the appellants: it is entirely consistent with the existence of an absolute duty. However absolute the duty may be, a pursuer cannot succeed unless he proves that his injury was caused by a breach of that duty. In *Lewis* v. *Denye* (5) there had been a breach of absolute duty but the plaintiff's action failed because the cause of his injury was held to be not that breach of duty but his own negligence in failing to use a safety device with which he had been furnished. It was accordingly appropriate to re-state that such a duty does not make the employer an insurer. If, in the present case, the appellants had proved that George Millar's death was due to his own negligence and not to their breach of duty they would have succeeded. In *Smith* v. *Cammell Laird & Co., Ld.* (6) Lord Atkin said: " It is precisely " in the absolute obligation imposed by statute to perform " or forbear from performing a specified activity that a breach " of statutory duty differs from the obligation imposed by " common law, which is to take reasonable care to avoid " injuring another." It was argued that Lord Atkin's reference to " a specified activity " means that the pursuer must specify the act, the doing or neglect of which led to the plant not

(1) [1938] A. C. 57, 78.
(2) [1943] A. C. 1.
(3) [1940] A. C. 921, 930.
(4) [1940] A. C. 152, 164.
(5) [1940] A. C. 921.
(6) [1940] A. C. 242, 258.

being safe. I do not so read the words. In that case shipbuilding regulations made under the Factory and Workshop Act had provided that all staging should be securely constructed of sound and substantial material and should be maintained in such condition as to ensure the safety of all persons employed. A workman fell and received injuries as a result of there being a defect in staging, but no point was made in the case about the precise nature of the defect. I think that Lord Atkin was referring to an activity specified in the statute or regulation: he cannot have meant that there was an absolute obligation to perform or forbear from performing some activity not so specified. Reference was also made to a passage in the speech of Lord Warrington of Clyffe in *Lochgelly Iron & Coal Co., Ld.* v. *M'Mullan*(1), quoted by Lord Thankerton in *Riddell* v. *Reid* (2) beginning with the words "If the obligation is to do or abstain from doing "a particular thing" and it was argued that the particular thing which it was the obligation of the appellants to do in the present case to avoid the accident has not been discovered. I do not agree. The obligation of the appellants was that which is expressed in the Act—to maintain the hoist in efficient working order. That is the particular thing which they were under a duty to do. How they did it or how they failed to do it was their concern. It was not the concern of the workman and is not the concern of the respondent. None of the other authorities cited appears to me to have any direct bearing on the present case or to aid in its decision. I agree with the opinions of the majority of the judges of the Second Division and I would dismiss this appeal.

Appeal dismissed.

Solicitors for appellants: *J. K. Edmondson & Co. for J. Gibson Kerr W.S., Edinburgh.*

Solicitors for respondent: *H. S. L. Polak & Co. for Frederick Robinson, Edinburgh.*

(1) [1934] A. C. 1, 13.

(2) [1943] A. C. 1, 10.

[HOUSE OF LORDS.]

H. L. (E.)*

1948

Nov. 9, 10, 11, 15.

1949

Jan. 19.

COMPTOIR D'ACHAT ET DE VENTE DU BOERENBOND BELGE S/A . . . APPELLANTS;

AND

LUIS DE RIDDER LIMITADA. . . RESPONDENTS.

(THE JULIA)

Contract—Sale of goods—Delivery order tendered by sellers—Payment by buyers—Property in goods never transferred—Contract destination—Diversion of ship by sellers—No consent by buyers—Total failure of consideration—Not c.i.f. contract.

By a contract made in April, 1940, the sellers, an Argentine company, sold to the buyers, a Belgian company, 500 tons of rye for shipment "c.i.f. Antwerp," on the terms contained in Form 41 of the London Corn Association. The contract provided for payment "on first presentation of and in exchange for first "arriving copy/ies of bill/s of lading . . . . and/or delivery order/s "and policy/ies and/or certificate/s . . . . of insurance." The sellers were to pay for any deficiency in weight; they guaranteed condition on arrival and made themselves responsible for all averages. The rye sold was part of a larger parcel covered by a bill of lading signed before the contract was made and the policies of insurance effected by the sellers covered a quantity different from that sold and that covered by the bill of lading amount. Both the bill of lading and the policies remained throughout in the possession of the sellers or their agents. The sellers exercised their option to demand payment in exchange for a delivery order. The sum to be paid, by cable transfer to New York, against the delivery order, was stated in a provisional invoice handed to the buyers to be $4,999.33, i.e., cost less freight plus a proportion of insurance. A delivery order directed to the sellers' agents at Antwerp was handed to the buyers against payment of this sum. It was indorsed by the agents with an undertaking to honour it. The sellers delivered to their agents two certificates of insurance and the delivery order in terms recognized the buyers' interest in these to the extent of their purchase. The charterparty under which the ship sailed recognized no port of discharge but Antwerp. While she was still at sea the Germans invaded Belgium and occupied that town. By arrangement between the owners and the sellers as charterers, but without the buyers' consent the ship discharged her cargo at Lisbon, where it was sold by the sellers. It was admitted that the property in the rye had never passed to the buyers, who claimed total reimbursement of the sum paid by them:—

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* *Present:* LORD PORTER, LORD SIMONDS, LORD DU PARCQ, LORD NORMAND and LORD MACDERMOTT.

Held, that despite the designation of the contract as "c.i.f." the true effect of all its terms must be taken into account and, in the light of these, the contract was not "c.i.f." but a contract to deliver at Antwerp. The payment made was not for the documents as representing the goods but for delivery of the goods themselves. There was a frustration of the adventure and no part performance and the consideration had wholly failed so that the buyers were entitled to recover the amount paid.

Decision of the Court of Appeal [1947] W. N. 261; 177 L. T. 648, reversed.

APPEAL from the Court of Appeal (Lord Greene M.R. and Croom-Johnson J., Asquith L.J. dissenting).

The facts stated by Lord Porter were as follows: The appellants were the buyers and the respondents were the sellers under a written contract filled in as follows, on a London Corn Trade Association form:

"Belgische Boerenbond Antwerp, April 24, 1940.
"April 27, 1940—Antwerpen

"Mr./Messrs. Comptoir d'Achat et de Vente
"du Boerenbond Belge S.A.
"Antwerp.

"Dear Sir(s)

"I/We herewith confirm having sold to you this day "(quantity) ab. 500 (five hundred) tons of 1,000 kilos "(description) of Plate rye faq rye terms crop 1939/40 of a "nat. weight of 72/73 kilos per hect. guar. at disch. as per "clause at the back for shipment per steamer/s &/or power "vessel/s *Julia* afloat as per bill or bills of lading dated or to "be dated accordingly at the price of $4.025 (four dollars "two cents and a half) U.S.A. currency per 100 kilos c.i.f. "Antwerp on the terms, conditions and rules contained in "Form No. 41 of the London Corn Trade Association . . . . "and the details above and on the back given shall be taken "as having been written into such form . . . .

"Yours truly,

"p.p. Luis de Ridder Limitada
"p.p. Belgian Grain & Produce Co., Ld."

Belgian Grain & Produce Co., Ld. (hereinafter called "Belgian Grain") were the sellers' agents at Antwerp.

Clauses attached to the contract by slips printed on the back thereof provided: "Payment to be made by nett

H. L. (E.)

1948

Comptoir D'Achat et de Vente du Boerenbond Belge S/A v. Luis de Ridder Limitada (The Julia).

" cash on first presentation of and in exchange for first " arriving copy/ies of bill/s of lading . . . . and/or delivery " order/s and policy/ies and/or certificate/s and/or letter/s " of insurance at Antwerp by first rate cable transfer on " New York, unless the vessel carrying the goods arrives " before the said time, in which case payment is to be made " on arrival of vessel at port of discharge. Buyers to remain " responsible for the payment of the cable. Insurance: " Losses to be paid in currency of this contract . . . . War " Deviation Clause. Buyers agree to accept documents " containing the Chamber of Shipping deviation clause " and/or any other recognized official war risk clause. " . . . . Any expenses for covering the L. C. T. Association's " war risk and strike risk exceeding one half per cent. to be " for account of buyers. The rate of insurance not to exceed " the rate obtainable in London on the date of bill of lading " or date of steamer's sailing from last loading port for which " bill or bills of lading are issued, whichever may be definitely " adopted by underwriters. Condition guaranteed on arrival " (subject to any country damaged grain in the fair average " quality of the season's crop) but in the event of the grain " arriving out of condition, due allowance to be made for any " delay whatsoever occurring after loading of the goods, any " such delay to be taken into consideration by arbitrators. " The natural weight to be ascertained and determined at " port of discharge at the Chambre Arbitrale et de Conciliation " pour Grain et Graines by Liter Scale within 28 days from " discharging. Fees to be divided between buyers and sellers. " Allowance of 1% per kilo shortage or fractions in proportion."

According to Form 41 of the London Corn Trade Association the goods were bought and sold at a price per so many kilos shipped, including freight and insurance to the port of destination. The freight was payable on discharge and payment was to be cash " in exchange for shipping documents . . . . " If shipping documents have not been sighted at time of " vessel's arrival at port of discharge, seller must provide " documents entitling buyer to obtain delivery of the grain " and payment must be made in exchange for same, such " payment to be made without prejudice to buyer's rights " under the contract . . . . Seller to give all policies and/or " certificates of insurance . . . . on any parcel . . . . for " not less than 2 per cent. over the invoice amount, any " amount over 2 per cent. to be for seller's account in case

H. L. (E.)
1948
COMPTOIR D'ACHAT ET DE VENTE DU BOERENBOND BELGE S/A
v.
LUIS DE RIDDER LIMITADA (THE JULIA).

"of total loss only and if and when called upon for the purpose "of claiming upon underwriters to give a letter certifying "that there are no other insurances effected by him . . . . In "the event of a certificate of insurance being supplied, it is "agreed that such certificate shall be exchanged by seller "for a duly stamped policy if and when required . . . . The "grain to be weighed . . . . Seller and buyer to have the "right of supervision both as to weighing and delivery. Any "deficiency on bill of lading weight to be paid for by seller "and any excess over bill of lading weight to be paid for by "buyer at contract price . . . . Condition guaranteed on "arrival . . . . Samples to be taken and sealed at port of "discharge jointly by the agents of the shippers and of the "holders of the bill of lading or shippers' delivery order. "All average to be for seller's account . . . ."

Before they made the contract the sellers had entered into a charterparty under which the Greek steamer *Julia* was to load at Bahia Blanca a full cargo of wheat and/or maize and/or rye for carriage to and delivery at Antwerp. That steamer duly loaded a cargo which included 1,120,000 kilos (1,120 tons) of rye in bulk, in respect of which the master on April 18, 1940, signed a bill of lading which acknowledged shipment by the sellers and provided for delivery at Antwerp to the order of Belgian Grain on payment of freight in accordance with the charterparty.

On April 29, 1940, Belgian Grain sent to the buyers a provisional invoice (No. 5362) dated Antwerp, April 29, 1940. In the terms of the translation, the sum payable was arrived at as follows:

"Bulk 500,000 kilos	
"at $4.025 per 100 kilos c.i.f. Antwerp	$20,125.00
"Less freight as per D/O	$15,250.00
	$4,875.00
"Insurance $4,973.	
"War risks 3% of which 2½% for your account	$ 124.33
	$4,999.33

A marginal note provided: "C. I. F. Business: Your "share in the insurance is limited to 2% over the net amount "of the invoice." (The sum of $4,973 was 2% over the net amount of the invoice—viz. $4,875—and the war risk insurance at 2½% was calculated on the basis of the former sum.)

H. L. (E.)

1948

COMPTOIR D'ACHAT ET DE VENTE DU BOERENBOND BELGE S/A *v.* LUIS DE RIDDER LIMITADA (THE JULIA).

The invoice contained the request : " The freight being payable " in New York we ask you to be good enough to settle same " with us by cable transfer."

On April 30, 1940, Belgian Grain sent a delivery order (No. 600) dated in Antwerp, April 30, 1940, addressed to F. Van Bree S.A. (hereinafter called " Van Bree ") of Antwerp, a firm of cargo superintendents employed on behalf of the sellers to handle the shipment. The following is the translation of the material parts of the document, which was in French : " Against the present delivery order please release to the " Comptoir d'Achat et de Vente du Boerenbond Belge S.A., " Antwerp, or to the bearer bulk 500,000 kilos . . . . rye " ex B/L for 1,200,000 kilos rye in bulk shipped by Messrs. Luis " de Ridder Ltda, S.A.C. Buenos Aires, to be received according " to the clauses and conditions of the bill of lading dated " Bahia Blanca, 18.4.1940 . . . . We give a share to the " bearer of the present delivery order of $4,973 (four thousand " nine hundred and seventy three dollars U.S.A.) in a " certificate of insurance for $7,117 covering 700,000 kilos " rye in bulk (war and S.R. and C.C. risks clause included)." This was signed on behalf of Belgian Grain and a footnote was as follows : " To be presented on arrival of the steamer " at Messrs. F. Van Bree S.A., Antwerp, for signature and " release after payment of the freight of $15,250 at the offices " of the Belgian Grain & Produce Co. Ld." Before transmission to the buyers of the delivery order it was indorsed by Van Bree as follows : " We undertake to honour the present " delivery order according to the clauses and conditions " of the bill of lading and the bearer has all the rights and " obligations of the original document which we hold for " his inspection." In the original French this was as follows : " Nous nous engageons à honorer le présent delivery order " aux clauses et conditions du connaissement et le porteur " a tous les droits et obligations du document original que " nous tenons à son inspection."

The buyers accepted the provisional invoice and delivery order and on April 30, 1940, paid the sum of 4,999.33 United States dollars. On or about the same day the sellers delivered to Van Bree two certificates of insurance (one in respect of marine risks and the other in respect of war risks) signed by Outshoorn & Landau, insurance brokers, in the following terms: " This is to certify that insurance is effected in Antwerp " . . . . for account of Luis de Ridder Limitada . . . . in

H. L. (E.)

1948

Comptoir D'Achat et de Vente du Boerenbond Belge S/A v. Luis de Ridder Limitada (The Julia)

"the sum of seven thousand one hundred and seventeen "U.A.A. dollars on 700,000 kilos rye in bulk. B/L dated "Bahia Blanca 18.4.1940 so valued per s.s. *Julia* from Bahia "Blanca to Antwerp . . . . It is understood and agreed that "this certificate represents the original policies and conveys "all the rights of the original policy holder for the purpose of "collecting any loss or claim . . . . This certificate may be "exchanged for a duly stamped policy if and when required ". . . . This certificate not valid unless countersigned by "Belgium Grain & Produce Co., Ld." (There was no evidence whether or not it was in fact so countersigned.) There were two contracts of insurance between them covering the goods from the time they came into the possession of the sellers until arrival at destination.

On or about May 10, 1940, while the *Julia* was at sea in the course of her chartered voyage, Belgium was invaded by the Germans and shortly afterwards Antwerp was occupied by the German forces. Thereupon by an arrangement made between the owners of the *Julia* and the sellers (as charterers) but without the knowledge or consent of the buyers, the *Julia* was directed to Lisbon and the bill of lading together with the certificates of insurance having, without the authority of the buyers, been taken from Antwerp to Bordeaux by one of the managers of Van Bree in May, 1940, new bills of lading were signed by the master in respect of the rye showing Lisbon as the destination. Upon these new bills of lading the rye was delivered at Lisbon and there sold by the sellers, without informing the buyers, ex ship for a price less than that for which the buyers had contracted.

By a letter dated September 14, 1940, the sellers offered to account to the buyers for the sum which they had received but the buyers refused this offer and claimed reimbursement in full of the sums paid under the contract (viz., the sterling equivalent of $4,999.33 which was agreed to be 1,243*l*. 12*s*. 2*d*.). The buyers in their points of claim alleged that the sellers had "wholly failed to deliver or cause to be delivered to "the [buyers] at Antwerp the said 500 tons of rye or any part "thereof. In the premises the consideration for which the "[buyers] made the said payment of United States dollars "4,999.33 to or for the account of the [sellers] wholly failed" (para. 5). They further alleged that by reason of the occupation of Antwerp by the German forces it became impossible for the *Julia* to proceed "to Antwerp or for the [sellers] to deliver

". . . . at Antwerp the said 500 tons of rye or any part "thereof. In the premises the said contract was frustrated "and the consideration for which the buyers made the said "payment of United States dollars 4,999.33 to or for the "account of the [sellers] wholly failed" (para. 6). The sellers, on their part, denied in para. 4 of their points of defence "that the consideration for which the [buyers] made "the said payment of 4,999.33 United States dollars wholly "failed" but added that that if "it was the duty of the "[sellers] to deliver . . . . the said goods in Antwerp it is "admitted that the said contract was frustrated."

In his award in the form of a special case, dated July 23, 1946, the umpire found in paras. 8 to 11 that for ten years before the contract the parties had been doing business and that the course of business in these cases of which there were some 900 instances, was that Belgian Grain sent the buyers a provisional invoice (similar in form to that sent in the present case) showing the amount payable for the goods less the freight; soon afterwards Belgian Grain sent the buyers a delivery order (again in the same form as that used in the present case) addressed to Van Bree and thereupon the buyers paid Belgian Grain the amount named in the provisional invoice. On arrival of the vessel carrying the cargo the buyers handed the delivery order together with a cheque in favour of Belgian Grain for the freight shown due on the provisional invoice to a firm named Carga S.A. (hereinafter called "Carga"), who were their own cargo superintendents' at Antwerp. Carga then handed the cheque to Belgian Grain and at the same time presented the delivery order to them. Belgian Grain then signed a note at the foot thereof acknowledging receipt of the freight. Carga then presented the delivery order to Van Bree who retained it and issued against it a release (or "laissez suivre") addressed to themselves and authorizing the delivery to Carga of the parcel or the required quantity ex bulk. However, before physical delivery of the goods to Carga could be obtained, it was necessary for Van Bree to receive from the ship's agents a further release, the "captain's laissez suivre", and this was not issued until the chartered freight had been paid by the sellers (as charterers) to the agents of the ship or until they were satisfied that it would be paid concurrently with the discharge of the cargo. The umpire stated: "The captain's laissez suivre was addressed "to his staff or superintendents on board the ship and instructed "them to deliver the goods mentioned in the bill of lading; "it was thus the effective document upon which F. Van "Bree S.A. obtained physical possession of the goods; it "was issued to F. Van Bree S.A. and was never physically "in the buyers' hands." As to the insurance documents, the umpire found that, according to the course of business between the parties, the insurance certificates were handed to Van Bree and did not pass through the buyers' hands at all nor did the buyers see them. He stated: "Only two "instances were cited to me in which on contracts in the "same form as that in question and between these parties "claims had arisen under the policies. These were the cases "of shipments made in 1940 per s.s. *Uruguay* and s.s. *Luxem*-"*bourg* both of which vessels sank (or were sunk) and their "cargoes were totally lost. In both those cases the buyers "received (after the liberation of Belgium) from Belgian "Grain & Produce Co., Ld. remittances for the insured value "of their parcel less a small collecting commission. I regard "it as a fair inference from the evidence that these claims "were, without any express instructions from the buyers, "collected from the underwriters by the Belgian Grain & "Produce Co., Ld., or by insurance brokers on their behalf "and I so find." The umpire further found that in this case the insurance certificates "were received by F. Van Bree S.A. "from the Belgian Grain & Produce Co., Ld. and would not "have passed through the hands of, or even been seen by, "the buyers. So far as it is a question of fact I find that "F. Van Bree S.A. were at no time and in no respect the agents "of the buyers and that the sellers did not, by delivering "to F. Van Bree S.A. certificates of insurance in respect of "these goods, constructively deliver the said certificates to "the buyers, nor did F. Van Bree S.A. at any time hold the "said certificates of insurance (whether or not they had "in fact been countersigned by the Belgian Grain & Produce "Co., Ld.) at the disposal of the buyers." The umpire further found that "had the *Julia* arrived at Antwerp, the procedure "which would have been followed by the parties in implementing the contract of sale would have involved that at "no time would the buyers or any agent on their behalf "have had in their possession a document of title entitling "the buyers to demand delivery of the goods from the ship, "nor an insurance document upon which in the event of any "claim having arisen under the policies they could have sued "the underwriters . . . . I further find that the rye which "was the subject of the contract would not have been "ascertained within the meaning of s. 16 of the Sale of Goods "Act, 1893, until it was actually separated from the greater "bulk in the ship's hold, i.e., on discharge and on being "weighed in the elevator; and, so far as it is a question of "fact, I find that it would have been at that stage only that "the property in the rye would have passed to the buyers. "Until then the sellers would have retained control of the "goods." In these circumstances, the question of law stated by the umpire, in para. 16 of the special case, for the decision of the court was "whether upon the facts as found and "upon the true construction of the contract the buyers are "entitled to recover from the sellers the sum of 1,243*l*. 12*s*. 2*d*., "together with interest at the rate of 4 per centum per annum "from April 30, 1940." In para. 18, subject to the decision of the court, he answered the question of law in the negative but in para. 19 he made an alternative award in favour of the buyers to take effect should the court decide the question of law set out above in the affirmative. His decision was affirmed by Morris J. and by a majority of the Court of Appeal. The buyers appealed to the House of Lords.

Sir William McNair K.C. and *Eustace Roskill* for the appellants (the buyers). The contract, on its true construction disclosed the common intention of the parties that after payment of the purchase price the property should pass to the buyers at Antwerp if and when the vessel arrived there and delivery was made to the sellers. The terms of the contract defining the sellers' obligations ought to be so construed as to give effect to this intention. The obligation of the sellers was to procure delivery and the consideration for which the price was paid was the promise to sell the rye on terms which would make available to the buyers the usual rights against the ship and the insurers. Alternatively the sellers remained under a continuing obligation not by their own act to destroy the contract of affreightment by which alone the contract of sale could have effect. This was not a c.i.f. contract, of which it lacked almost every essential element. It was in fact a "rye terms" contract. In a c.i.f. contract there is a transfer of rights against the shipowners, the persons in possession of the goods and the underwriters, and, assuming the goods have been shipped in proper condition, the sellers are under no liability for their condition on arrival or for non-arrival. In this case, on the contrary, the sellers guaranteed condition on arrival; all average was for their account; they retained the bill of lading which would procure delivery from the ship and they retained the insurance policies. The delivery order conferred no new rights on the buyers and the handing over of it was not the consideration for which the payment was made; it was merely a cogwheel in the machinery for enabling the sellers to perform the obligation already undertaken by them under the contract of sale. But, by contrast, in a c.i.f. contract if the buyer takes up the bill of lading the property passes to him and prima facie the risk passes with the property, whereas here there was neither actual physical delivery of the goods nor the symbolic delivery effected when a bill of lading is taken over. This is not a case like *Inglis* v. *Stock* (1) or *Sterns Ld.* v. *Vickers Ld.* (2). Here the contract itself contains indications that the risk did not pass till the property passed: see Sale of Goods Act, 1893, s. 20. The sale contract having been made after the goods had been shipped as part of a larger undivided bulk could never have been performed as a c.i.f. contract but only as an ex ship or arrival contract and in so far as *In re Denbigh Cowan & Co. and R. Atcherley & Co.* (3) is inconsistent with this submission it was wrongly decided and should be overruled. The consideration for which the money was here paid was not the sellers' promise but the performance of the promise: *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ld.* (4). See also *Produce Brokers New Company* (1924) *Ld.* v. *Wray, Sanderson & Co., Ld.* (5). The sellers did not give the buyers the performance for which they paid the money. They gave neither actual nor symbolic delivery of the goods.

Le Quesne K.C., *Naisby K.C.*, and *J. B. Hewson* for the respondents (the sellers). This is a case of a c.i.f. contract. The risk of the marine loss passed to the buyers, as appears from the course of dealing between the parties in the case of the two ships that were previously lost, when the insurance claims were collected by Belgian Grain on behalf of the buyers. The basis of their course of dealing was that the buyers were trusting the sellers to collect their insurance claims and see

(1) (1885) 10 App. Cas. 263.
(2) [1923] 1 K. B. 78.
(3) (1921) 90 L. J. (K. B.) 836.
(4) [1943] A. C. 32, 48, 53.
(5) (1931) 39 Ll. L. Rep. 257, 260.

that they were duly credited to them; instead of insisting on being given the documents which would enable them to sue the underwriters themselves, they were content that the sellers should keep in their possession the policies and the bills of lading. The risk of marine loss had passed to the buyers from the time they took up the relevant documents and they were thereafter interested in the maritime transit. The parties were treating this as c.i.f. business and their dealings were characteristic of a c.i.f. contract: see the findings of the umpire setting out their course of business. This was not an ex ship contract: see the war deviation clause in the contract. If the goods had been lost the rights under the bill of lading would in fact have been available to the buyers. The clause dealing with payment, in the contract, treated the delivery order as the equivalent of the bill of lading and the price as being paid for it. In the contract the price was described as a c.i.f. price and the business as c.i.f. business. The sellers' contentions are supported by *Ross T. Smyth & Co.* v. *T. D. Bailey, Son & Co.* (1). The sellers completed their obligations under this contract just as they complete them under the classic c.i.f. contract by handing over the proper documents. When they had handed over the delivery order they had performed their contract as fully as if they had delivered the bill of lading. A contract may remain a c.i.f. contact although there be some slight deviation from the classic c.i.f. form: see *Arnhold Karburg & Co.* v. *Blythe, Greene, Jourdain & Co.* (2); *G. Groom, Ld.* v. *Barber* (3); *In re Denbigh Cowan & Co. and R. Atcheley & Co.* (4); *Ant. Jurgens Margarinefabrik* v. *Louis Dreyfus & Co.* (5); and *Gunn* v. *Bolckow, Vaughan & Co.* (6). In this case the buyers were not liable to pay the sellers save against delivery of documents but, once the documents were delivered, the goods were at the buyers' risk in respect of any loss not covered by insurance. Thus, though the sellers were under the obligation to provide certificates of insurance, the benefit of which was available thereafter to the buyers, they did not guarantee the underwriters' solvency. On the true construction of the contract, the fact that the property had not passed to the buyers and that they were not the owners of the goods did not affect the position that the goods were at their risk: see *Sterns Ld.* v. *Vickers Ld.* (1); *Stock* v. *Inglis* (2) and *Inglis* v. *Stock* (3). See also *The Parchim* (4). Under the contract, as between the sellers and the buyers, the delivery order was equivalent to the goods, though not in the full sense that its possession conferred on the holder the right of property in the goods valid against all the world. Though there was no physical delivery of the goods, the handing to the buyers of the delivery order might perhaps be regarded as symbolic delivery, but in any event, the sellers discharged their obligation to the buyers who received what the sellers had contracted to give them; the contract did not admit of a claim against the sellers in the event of the buyers failing to get the goods. The buyers have not shown that, though they received the delivery order, they got nothing. Though it is true that they received no grain, they received a document which, in certain circumstances, would have enabled them to get the grain and plainly such a document cannot be treated as worth nothing. This case is thus distinguishable from *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ld.* (5), where Lord Macmillan said: "In return for their money the appellants have received "nothing whatever from the respondents by way of fulfilment "of any part of the contract. It is thus a typical case of a "total failure of consideration." There the respondents were manufacturers who had sold to the appellants machinery to be delivered c.i.f. and the appellants had made a payment in advance. If shipping documents had been tendered and afterwards there had been impossibility of performance the decision would have been different. Here when impossibility of performance intervened the sellers had done what the contract required of them. The consideration for which the buyers paid did not wholly fail, for, in the words of the second reason set out in the sellers' case in this appeal: "at "the time of payment the respondents" (sellers) "had "performed all that they were required to do under the contract "of sale" or, in the words of their third reason, they "had "performed at least a part of what they were required to do "under the contract of sale." Thus they had done something towards carrying out the contract and there could not be a total failure of consideration. Moreover the delivery order which was handed over was a document of legal and commercial value and it was in exchange for it, as stipulated by the contract, that payment was made. By its terms it had a special value for the buyers in that it contained a promise by Van Bree that they personally would honour it. The buyers thus had a right of recourse against Van Bree on their personal undertaking and guarantee which they had not had before. There was sufficient consideration moving from the buyers to Van Bree: see *Shadwell* v. *Shadwell* (1); *Scotson* v. *Pegg* (2) the judgment of Wilde B.; Anson's Law of Contract (19th ed.), pp. 98-9 and Cheshire and Fifoot's Law of Contract, p. 69. On the whole question of the construction of the contract, the sellers' construction, based on all the documents and the course of business between the parties, is more natural than that of the buyers. As to the criticism by Asquith L.J. of the sellers' action in diverting the ship to Lisbon, this matter was not before the umpire and the buyers cannot rely on it. Moreover the contract was rendered impossible of performance by reason of the outbreak of war, not nullified by the conduct of the sellers. It had become impossible of performance before anything was arranged about a new destination. Thus the bill of lading and delivery order were rendered ineffective and valueless by the fact, for which the sellers were not responsible, that the ship could not go to Antwerp and any subsequent act of theirs could not further affect the value of these documents. The important thing is that they were valid at the time of tender and payment and were accepted as such, that being the crucial time. Whatever rights the buyers might obtain from a subsequent wrongful act of the sellers, such act could not produce a total failure of consideration ex post facto. The sellers were within their rights in changing the ship's destination and the buyers have no remedy at law.

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(1) [1940] 3 All E. R. 60, 70.
(2) [1915] 2 K. B. 379, 387.
(3) [1915] 1 K. B. 316, 324.
(4) 90 L. J. (K. B.) 836, 839.
(5) [1914] 3 K. B. 40.
(6) (1875) L. R. 10 Ch. 491, 502.

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(1) [1923] 1 K. B. 78, 84.

(2) (1884) 12 Q. B. D. 564, 566, 573, 575, 576.

(3) 10 App. Cas. 263.

(4) [1918] A. C. 157, 171.

(5) [1943] A. C. 32, 61.

Naisby K.C. following. The relevant questions are: What was the consideration for which the payment was made? Did it wholly fail? The doctrine of consideration is a legal concept but what was the consideration in any given case is a question of fact. It is suggested that here the consideration was either the promise to sell the rye on terms that would make available to the buyers the usual rights against the vessel and the insurers or else that it was the physical or symbolic delivery of the rye. But that would be to make a contract

(1) (1860) 9 C. B. N. S. 159.
(2) (1861) 6 H. & N. 295, 300.

for the parties which they have not made for themselves. The words "on first presentation of and in exchange for" indicate the nature of the consideration. Part performance of the contract by one party was the consideration for part performance by the other. The sellers' part was shipping the rye, obtaining affreightment and giving the delivery order to the buyers. The buyers' part was paying a sum equal to about a quarter of the purchase price. Even if the consideration for this payment thereafter failed because of something which happened after that date, yet on the true construction of the contract the payment would be irrecoverable. But the consideration did not wholly fail, for the buyers had received something which, in their view, enabled them to get the benefit of the insurance, if the goods were lost. This is supported by the course of business in the case of the two ships which were lost in 1940. The buyers got that in exchange for which they had made the payment. No business man would agree to pay for a worthless document. If the opportunity of getting the benefit of the insurance documents is any part of the consideration it cannot have failed. It does not matter whether or not the document actually conferred legal rights. The references in the delivery order to the bearer (porteur) evidently contemplate the negotiability of the document. If it forms part of the consideration it is for the buyers to show that it is of no commercial value but the fact of transferability indicates that it has a commercial value.

Sir William McNair K.C. in reply. When the buyers paid the money they were paying for the sellers' promise to deliver the goods. This is a "rye terms" contract and not a c.i.f. contract. The fact that it is called a c.i.f. contract makes no difference: see Scrutton on Charterparties (11th ed.), p. 192, note (m). This was the last edition prepared by Scrutton L.J. himself. Since then the note has been modified but not in any manner material to this case: see the 15th ed., p. 192, note (a), where reference is made to *R. & W. Paul Ld.* v. *National Steamship Co. Ld.* (1). See also Kennedy on C.I.F. Contracts (2nd ed.), p. 5. In this case there was no question of performing the contract by bill of lading, and it could not have been performed by delivery order after the loss of the cargo because that would be an idle farce. On the facts

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(1) (1937) 43 Com. Cas. 68.

H. L. (E.)

1948

COMPTOIR D'ACHAT ET DE VENTE DU BOERENBOND BELGE S/A *v.* LUIS DE RIDDER LIMITADA (THE JULIA).

the sellers could never take the money and retain it unless the cargo was delivered. In the finding relating to the two ships sunk in 1940 there is nothing to suggest that payment was made against the delivery orders or that when the buyers made payment the ships were already sunk. The parties did not contemplate that the risk had passed to the buyers. A delivery order is not complete until the baillee has attorned to the buyer and thus become the latter's agent as custodian of the goods: see Benjamin on Sale (7th ed.), p. 894. Here the form of contract is in contrast with that in *In re Denbigh Cowan & Co. and R. Atcherley & Co.* (1) and *G. Groom Ld.* v. *Barber* (2) relied on by the sellers. They also relied on *Ant. Jurgens Margarinefabrik* v. *Louis Dreyfus & Co.* (3). That was a case of an ex ship contract. Further, the party on whom the delivery order was drawn was actually in possession of the goods in question. The case was under the Factors Act, 1889: see Chalmers on Sale of Goods (12th ed.), p. 185, the note on s. 1, sub-s. 4 of the Act, which contains a definition of the expression "document of title." In *Gunn* v. *Bolckow, Vaughan & Co.* (4), also relied on by the sellers, there was no document of title that gave the buyers a right to the goods. *Inglis* v. *Stock* (5), properly understood, is a decision to the effect that theoretically the risk may pass before the property and that in that particular case it did. The material point here is not whether the sellers gave something of value but whether they gave what they contracted to give, viz., the goods. *Scotson* v. *Pegg* (6) is not in their favour but rather is against them: see Scrutton on Charterparties (15th ed.), p. 363, note 1. As to the point on the diversion of the ship, if the contract was frustrated before the diversion no complaint can be made that the diversion was a breach of contract but the buyers claim that the contract was frustrated and the sellers deny it.

Le Quesne K.C. As to the three provisions mentioned in Scrutton on Charterparties (15th ed.), p. 192, note (a), the third does not occur in this case at all: see *In re Denbigh Cowan & Co. and R. Atcherley & Co.* (7). With regard to the first, see *Arnhold Karburg & Co.* v. *Blythe, Greene, Jourdain*

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(1) 90 L. J. (K. B.) 836.
(2) [1915] 1 K. B. 324.
(3) [1914] 3 K. B. 40, 41, 44.
(4) L. R. 10 Ch. 491, 502.
(5) 10 App. Cas. 263.
(6) 6 H. & N. 295.
(7) 90 L. J. (K. B.) 836, 839.

& Co. (1). The second is clearly dealt with in the note: see also Kennedy on C.I.F. Contracts (2nd ed.), p. 6.

The House took time for consideration.

Jan. 19, 1949. Lord Porter. My Lords, this is an appeal for a judgment of the Court of Appeal affirming by a majority the judgment of Morris J. who upheld an award of an umpire stated in the form of a special case under the Arbitration Acts, 1889 to 1934. The arbitration arose out of a contract for the sale of rye by the respondents (the sellers) to the appellants (the buyers). The buyers, who were the claimants in the arbitration, asked for the refund of the purchase price paid by them under the contract on the ground that the consideration had wholly failed. The question for your Lordships' consideration is whether there was such total failure of consideration.

The learned judge in agreement with the umpire, as I understand him, regarded the contract as a c.i.f. contract modified to some extent, but not altered in its essential characteristics. The buyers had, in his view, entered into a contract for the purchase of documents or, more accurately, for the purchase of a parcel of rye, the fulfilment of which was to be implemented by the handing over of documents. The documents, he considered, might be varied at the option of the sellers, who would fulfil their contract if they chose to tender a delivery order instead of a bill of lading, and a certificate instead of a policy of insurance. Even the stringency of these obligations he regarded as reduced by the practice of the parties with the result that delivery order meant an instruction to their own agents (countersigned, it is true, by those agents) and a certificate of insurance which was never tendered to or held on behalf or at the disposal of the buyers. The delivery order, Morris J. considered (2), "doubtless possessed commercial value." In other words, the buyers were purchasers of documents and had received that for which they stipulated, i.e., the usual delivery order and a certificate of insurance which would compel or incite the sellers to recover any loss from underwriters and pay it over to the buyers. Croom-Johnson J. took much the same view, but the Master of the Rolls thought it unnecessary to decide these points since, in his opinion, the consideration had not wholly failed inasmuch as Van Bree had, by countersigning the delivery order, added their personal undertaking to the instructions which it contained and to that extent implemented the contract. Asquith L.J.'s dissenting judgment turned largely upon a criticism of the action of the sellers in diverting the ship in their capacity of charterers and bill of lading holders to a different port without consulting the buyers. My Lords, your Lordships have been told by the sellers that this last criticism is not a matter for your consideration, as it was not before the umpire and forms no part of the award, and I propose to disregard it as a substantive claim. Nevertheless the contention that a contract puts it in the power of a seller to change the destination of a vessel containing goods which he has shipped or contracted to sell, thereby leaving no remedy in the hands of the purchaser, either against the ship or against underwriters, is a matter which cannot be neglected in determining whether the contract is or is not concluded upon c.i.f. terms.

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(1) [1915] 2 K. B. 379, 387.

(2) (1947) 63 T. L. R. 130, 137.

My Lords, the obligations imposed upon a seller under a c.i.f. contract are well known, and in the ordinary case include the tender of a bill of lading covering the goods contracted to be sold and no others, coupled with an insurance policy in the normal form and accompanied by an invoice which shows the price and, as in this case, usually contains a deduction of the freight which the buyer pays before delivery at the port of discharge. Against tender of these documents the purchaser must pay the price. In such a case the property may pass either on shipment or on tender, the risk generally passes on shipment or as from shipment, but possession does not pass until the documents which represent the goods are handed over in exchange for the price. In the result the buyer after receipt of the documents can claim against the ship for breach of the contract of carriage and against the underwriter for any loss covered by the policy. The strict form of c.i.f. contract may, however, be modified: a provision that a delivery order may be substituted for a bill of lading or a certificate of insurance for a policy would not, I think, make the contract concluded upon something other than c.i.f. terms, but in deciding whether it comes within that category or not all the permutations and combinations of provision and circumstance must be taken into consideration. Not every contract which is expressed to be a c.i.f. contract is such. Sometimes, as in *The Parchim* (1), terms are introduced into contracts so described which conflict with c.i.f. provisions.

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(1) [1918] A. C. 157.

In the present case therefore it is not as if a usual form of delivery order had been given and accepted or an insurance certificate covering the parcel was in the hands of Van Bree as agents for the buyers, nor can a solution be found in the mere designation of the contract as c.i.f. This is not a case in which the overriding provision is the term c.i.f. under which antagonistic terms can be neglected on the ground that they are repugnant to the transaction, as was done by Rowlatt J. in *Law & Bonar Ld.* v. *British American Tobacco Co. Ld.* (1). The true effect of all its terms must be taken into account, though, of course, the description c.i.f. must not be neglected. It is true, no doubt, to say that some steps had been taken towards the performance of this contract, e.g., the goods had been shipped, an invoice sent, the customary so-called delivery order had been transmitted and that delivery order amongst its provisions contained a declaration by the sellers' agents, Belgian Grain and Produce Co. Ld. that they gave a share of the present delivery order of $4,973 in a certificate of insurance. But the taking of steps towards performance is not necessarily a part performance of a contract. The question is whether the purchaser has got what he is entitled to in return for the price. Of course, if the buyers paid the sum claimed in order to obtain the delivery order and the share purported to be given by it in the certificate of insurance, the contract would have been performed in part at least, but I do not so construe the contract, even when illuminated by the practice adopted by the parties. That practice seems to me rather to show that the payment was not made for the documents but as an advance payment for a contract afterwards to be performed. With all due respect to the learned judge and the Master of the Rolls, I can see no sufficient reason for supposing either that the delivery order had some commercial value or that Van Bree undertook a personal liability by their indorsement of the document. There was no evidence of commercial value and the document itself was merely an instruction by one agent of the sellers to another. In my view, if the Belgian Grain and Produce Co. Ld. were sued upon the document they would rightly reply that they were acting only as agents and Van Bree could make the same defence. The document appears to me to be no more than an indication that a promise already made by the sellers would be carried out in due course, but in no way increases their obligations or adds to the security of the buyers.

(1) [1916] 2 K. B. 605.

In my opinion, the method by which the contract was customarily carried out supports this view. No doubt the contract could have been so performed as to make it subject to the ordinary principles which apply to a c.i.f. contract. The tender of a bill of lading or even of a delivery order upon the ship, at any rate if attorned to by the master, and a policy or a certificate of insurance delivered to or even held for them might well put it in that category. But the type of delivery order tendered in the present case was a preliminary step only. A complicated procedure had to be followed before the goods would be released. The buyers had to hand the sum due for freight to their agents; those agents would then pay the freight and present the delivery order to the Belgian Grain and Produce Co. Ld., who would sign a note on it acknowledging receipt of the freight: the agents thereupon would hand the delivery order to Van Bree who would retain it and issue a " laissez suivre " or release to themselves authorizing delivery to the agents. But before physical delivery of the goods could take place Van Bree must have received a " Captain's laissez suivre " authorizing delivery to them. " It was thus," as the umpire says, " the effective " document upon which Van Bree obtained physical possession " of the goods; it was issued to Van Bree and was never " physically in the buyers' hands." Similarly, " the insurance " certificates," as the umpire also finds, " were received by " Van Bree from the Belgian Grain and Produce Co. Ld., " and would not have passed through the hands of, or even " have been seen by, the buyers." He further finds that Van Bree " were at no time and in no respect agents of the " buyers and that the sellers did not, by delivering the certificates to Van Bree, constructively deliver them to the " buyers nor did Van Bree at any time hold the certificates " (whether countersigned by the Belgian Grain and Produce " Co. Ld. or not) at the disposal of the buyers." In these circumstances the fact that the sellers twice collected the insurance money for a total loss and handed it to the buyers does not lead very far. It was a convenient method of settling accounts between the parties and, despite the extra two per cent., is in substance no more than a repayment of the money given for the goods.

My Lords, the object and the result of a c.i.f. contract is to enable sellers and buyers to deal with cargoes or parcels afloat and to transfer them freely from hand to hand by giving constructive possession of the goods which are being dealt with. Undoubtedly the practice of shipping and insuring produce in bulk is to make the process more difficult, but a ship's delivery order and a certificate of insurance transferred to or held for a buyer still leaves it possible for some, though less satisfactory, dealing with the goods whilst at sea to take place. The practice adopted between buyers and sellers in the present case renders such dealing well nigh impossible. The buyer gets neither property nor possession until the goods are delivered to him at Antwerp, and the certificate of insurance, if it enures to his benefit at all, except on the journey from ship to warehouse, has never been held for or delivered to him. Indeed, it is difficult to see how a parcel is at the buyers' risk when he has neither property nor possession except in such cases as *Inglis* v. *Stock* (1) and *Sterns Ld.* v. *Vickers Ld.* (2), where the purchaser had an interest in an undivided part of a bulk parcel on board a ship, or elsewhere, obtained by attornment of the bailee to him.

The vital question in the present case, as I see it, is whether the buyers paid for the documents as representing the goods or for the delivery of the goods themselves. The time and place of payment are elements to be considered but by no means conclusive of the question: such considerations may, on the one hand, indicate a payment in advance or, on the other, they may show a payment postponed until the arrival of the ship, though the property in the goods or the risk have passed to the buyer whilst the goods are still at sea, as in *Castle* v. *Playford* (3). But the whole circumstances have to be looked at and where, as, in my opinion, is the case here, no further security beyond that contained in the original contract passed to the buyers as a result of payment, where the property and possession both remained in the sellers until delivery in Antwerp, where the sellers were to pay for deficiency in bill of lading weight, guaranteed condition on arrival and made themselves responsible for all averages, the true view, I think, is that it is not a c.i.f. contract even in a modified form but a contract to deliver at Antwerp. Nor do I think it matters that payment is said to be not only on presentation but "in exchange for" documents. There are many ways of carrying out the contract to which that expression would apply, but in truth whether the payment is described as made on presentation of or in exchange for a document, the document was not a fulfilment or even a partial fulfilment of the contract: it was but a step on the way. What the buyers wanted was delivery of the goods in Antwerp. What the sellers wanted was payment of the price before that date, and the delivery of the documents furnished the date for payment, but had no effect on the property or possession of the goods or the buyers' rights against the sellers. If this be the true view there was plainly a frustration of the adventure —indeed the sellers admit so much in their pleadings—and no part performance and the consideration had wholly failed. The buyers are accordingly entitled to recover the money which they have paid. I would allow the appeal and pronounce for the alternative award with costs in your Lordships' House and in the courts below.

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(1) 10 App. Cas. 263.
(2) [1923] 1 K. B. 78.
(3) (1872) L. R. 7 Ex. 98.

Lord Simonds. My Lords, the facts relevant to this appeal are fully set out in the special case stated by the umpire and have been re-stated by my noble and learned friend on the woolsack. I will not repeat them.

The short question for your Lordships' determination is whether the consideration for which the buyers on April 30, 1940, paid to the sellers the sum of 4,999.33 United States dollars (the sterling equivalent of which was agreed to be 1,243*l.* 12*s.* 2*d.*) wholly failed so that the buyers are entitled to recover that sum from the sellers. This question was answered by Morris J. in the negative. I hope that I do no injustice to the careful judgment of the learned judge if I summarize it by saying that in his view there was not a total failure of consideration because, whatever may have been the legal value of the delivery orders which the buyers were accustomed to accept, such delivery orders possessed some commercial value. This decision was upheld by the Court of Appeal. The learned Master of the Rolls took the view (1) that "by virtue of the handing over of "the document the buyers obtained something that they "did not have before, namely, the personal obligation "of the sellers' local agent [Van Bree], obviously a thing of "value to them." He further held (2), and here, I think, is the crux of the matter, that "the delivery order was not a "mere piece of machinery but an implementation of the "sellers' obligation to produce what was in effect an under-

(1) (1947) 177 L. T. 648, 651. (2) Ibid. 652.

"taking and a guarantee of the buyers' rights by Van Bree." Croom-Johnson J. took substantially the same view. "The appellants," he said (1), "got at least a part of what they "contracted to pay for." Asquith L.J. on the other hand would have allowed the appeal, accepting the buyers' argument that the consideration wholly failed and holding that the receipt of the delivery order was not the consideration for the payment, the delivery order being (2) "a mere cogwheel "in the machinery."

The argument before your Lordships ranged over a wide field, much of it being directed to considering whether the contract between the parties was, or was to be regarded as, or was of the type of, or partook of the nature of a c.i.f. contract. I prefer, without giving the contract a label, to see what the parties respectively agreed to do and then to consider what is the legal effect of failure of performance. My Lords, it appears to me plain that here there was a contract for the sale of goods, viz., 500 tons of rye, and that that contract could be performed by either the physical or the symbolical delivery of the goods in accordance with its terms. It is common ground that there was not physical delivery. Was there then symbolical delivery? Certainly there was not. Again it is common ground that the property in the goods did not pass to the buyers. There was not, and indeed could not have been, any tender of a bill of lading, and I do not understand it to have been contended that the handing over of the delivery order in this case amounted to symbolical delivery. If it was so contended, the contention is in my opinion baseless. The contract, then, being for the sale of goods and the goods, though paid for, not having been actually or symbolically delivered, how do the sellers justify their contention that the consideration did not wholly fail? Departing, as it appears to me, from the reasoning which found favour with the majority of the Court of Appeal, counsel for the sellers urged, in the terms of the second of the formal reasons in their case, that "at the time of payment "the respondents had performed all that they were required "to do under the contract of sale." My Lords, this seems to me an astonishing proposition. The contract entitled the respondents as sellers to require payment "on first presentation "of and in exchange for first arriving copy/ies of bill/s of "lading . . . . and/or delivery order/s and policy/ies and/or

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(1) 177 L. T. 648, 657.

(2) Ibid. 653.

H. L. (E.)

1949

COMPTOIR D'ACHAT ET DE VENTE DU BOEREN-BOND BELGE S/A
v.
LUIS DE RIDDER LIMITADA (THE JULIA).

Lord Simonds.

"certificate/s and/or letter/s of insurance at Antwerp," etc., etc. Therefore, it was urged, the sellers had done all, and I emphasize the word "all," they were bound to do if and when they handed over a delivery order and certificates of insurance. I do not pause to examine the factual basis of this contention, for it seems to me to be wholly unsound in law. The fact that a seller at a certain stage in the carrying out of his contract is entitled by its terms to demand payment does not mean that at that stage he has fully performed his contract. Confusion, as I think, has arisen from the fact that, had the sellers been in a position and elected to tender shipping documents by virtue of which the property in the goods passed to the buyers, then the latter could not have contended that there had been failure of consideration. But this result would have ensued not because a clause in the contract provided for payment against documents, but because in law there cannot be failure of consideration if the property has passed. It is in fact, as Asquith L.J. pointed out, a part of the machinery by which the contract is carried out that payment should be made against, for instance, a delivery order and it is as little relevant to the question whether there has been failure of consideration as would be a provision that payment should be made, for example, on notification that the ship had left New York or had arrived at Cherbourg.

But then, it was said, assuming that the sellers did not perform all that they were required to do under the contract, yet they performed at least a part of what they were required to do. This contention had, I think, two slightly different aspects. In the first place it was said that there could not be total failure of consideration if the sellers had done something towards carrying out this contract and that they had done something, viz., handed over a delivery order. In the second place it was said that that something was itself of value, therefore there was not total failure of consideration. In its first aspect this contention appears to suffer from the same fallacy as that which I have already tried to expose. It is a confusion of the consideration for the contract with the mode in which it is to be carried out. But in its second aspect it demands closer attention, for here it has the support of the learned judges in the courts below.

My Lords, there is, in my opinion, no finding of fact by the umpire which would justify your Lordships in holding that the delivery order which was handed to the buyers had any commercial value in the ordinary sense. That it was not a document of title by itself entitling the buyers to delivery of the goods was expressly found. It is a matter of conjecture whether in these circumstances it had any commercial value, and your Lordships cannot found on conjecture. The case is, however, put not only on the general commercial value of such a document but upon the special value which is said to have accrued to the buyers from its terms. This is the view which was taken by the learned Master of the Rolls, whose words I have already cited. At this stage I would remind your Lordships that, as was pointed out by Viscount Simon in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ld.* (1), " when one is considering " the law of failure of consideration and of the quasi-" contractual right to recover money on that ground, it is, " generally speaking, not the promise which is referred to as " the consideration, but the performance of the promise." To this I would add that the receipt by the promisee of something which the promisor did not promise will not prevent a total failure of consideration. The valuable consideration which the Master of the Rolls thought the buyers received was a personal undertaking and guarantee by Van Bree, the local agents at Antwerp of the sellers, which was to be found in their indorsement of the delivery note with the words " Nous nous engageons à honorer le présent delivery " order aux clauses et conditions du connaissement, et le " porteur a tous les droits et obligations du document original " que nous tenons à son inspection." I cannot accept this view. It is, I think, reasonably clear that the words I have cited can give rise to no independent contractual rights against Van Bree. There is nothing in the umpire's award to suggest that Van Bree were acting in any other capacity than as agents for the sellers. If they were in fact acting or purporting to act as principals in respect of their indorsement of the delivery note, then, if, as I assume to be the case in the absence of evidence to the contrary, Belgian law is the same as English law, the buyers acquired against them no enforceable rights ; for, so far as they at least were concerned, there was no consideration for their engagement. But, as I have said, in my view Van Bree were acting throughout as agents, and, seen in its true perspective, their undertaking indorsed on the delivery order was not " a part of what they [the buyers] contracted to pay for," but a part of the machinery by which the sellers were to carry out their bargain. What the buyers bought was 500 tons of rye, not an indorsement on a piece of paper which brought them not a step nearer their rye until the ship arrived at Antwerp. I come, then, to the conclusion that the sellers performed neither all nor, in any material sense, a part of what they were required to do under the contract and that the buyers obtained no part of that which they had contracted to buy. There was therefore total failure of consideration.

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(1) [1943] A. C. 32, 48.

There is, however, one other matter to which I would briefly refer. The sellers, all else failing them, urged that the risk in the goods had passed to the buyers, even if the property had not, and that the insurance contract made by the sellers was available for the buyers. Assuming without deciding that these propositions are well-founded, I am unable to see how they assist the sellers. If the contract is, as I hold it is, a contract for the sale of rye to be performed by its physical or symbolical delivery what relevance has it that the sellers say at a certain stage that the risk has passed and that the insurance is available? It may well be that, if there is any validity in these propositions, the buyers, recovering upon the insurance policies, would hold the proceeds for the benefit of the sellers, but this does not seem to me to touch the question whether there has been a total failure of consideration. It is, I think, probable that the insistence by the learned counsel for the sellers on this aspect of the case was bound up with his reiterated plea that this was a c.i.f. contract. As I have ventured to point out, it is immaterial what the contract may be called or to what category of contract it is nearest akin, if it lacks that salient characteristic, which alone is relevant, namely, that the property in the goods not only may but must pass by delivery of the documents against which payment is made.

I would allow this appeal with costs here and below.

LORD DU PARCQ. My Lords, the parties to the contract which your Lordships have the task of construing certainly cannot be said to have expressed their meaning in lucid or readily intelligible terms, and I do not find it surprising that the dispute between them has led to a difference of judicial opinion. But, though I hesitate to say that there is no room for doubt, I have come to the conclusion that the appeal should be allowed for the reasons given by my noble and learned friend on the woolsack.

Lord Normand. My Lords, the issue in the appeal is whether, as a result of the frustration of the contract, there was a total failure of the consideration for the sum of 4,999.33 dollars paid by the buyers on April 30, 1940. The contract was an agreement to sell a quantity of rye and the sum paid was part of the stipulated price, as brought out in the provisional invoice. It follows that, unless there are in the contract terms modifying the ordinary incidents of a sale of goods, the transfer of the property in the rye was the consideration for which the sum now sued for was paid. For the full implement of the contract two things remained at the date of frustration, the payment of the remainder of the price by the buyers and the delivery of the rye by the sellers. Neither of these things could have been done before the arrival of the ship at Antwerp. Symbolical delivery was never intended, nor was symbolical delivery by bill of lading possible in the circumstances. The rye purchased by the buyers was part of a full cargo afloat and the bill of lading which had been taken covered the undivided bulk. That bill of lading was not one which the buyers would have been bound to accept. The delivery order presented to the buyers by the sellers' agents was not a document of title and was ineffectual to pass the property. Without physical delivery on arrival there could be no transfer of the property. It is found as a fact that the property was not transferred, but if that finding had not been made it would have been the necessary inference from the circumstances already stated. There is also a finding that if the ship had arrived at Antwerp the buyers would never have had in their possession any document of title enabling them to demand delivery of the goods.

What then is the basis of the contention that the buyers received consideration for the part of the price paid by them? The main proposition advanced by the sellers was that the delivery order must be treated as equivalent to the goods, though neither the property nor the risk passed, because the contract so provides. But there were independent and subsidiary contentions that the risk of marine loss had passed to the buyers, and, failing all else, that the delivery order was valuable consideration on one of two grounds, either that it was a document of commercial value or that it contained a promise by Van Bree that they personally would honour the delivery order in accordance with the terms of the bill of lading which they held for the inspection of the bearer.

I propose to consider first whether these subordinate contentions have any validity and relevance. Whether the passing of the marine risk under the contract would be relevant to the issue in the appeal may well be doubted. The agreement of parties that the buyers should bear the risk of a loss against which the insurance was provided for by the contract is not evidence of an intention that the buyers were also to take the risk of a frustration which was not within the contemplation of the contract. I have also difficulty in attaching any intelligible meaning in this case to the proposition that the marine risk passed though the property did not pass. " The " rule res perit domino is generally an unbending rule of law, " arising from the very nature of property." I quote from a judgment Lord President Inglis (then Lord Justice-Clerk) delivered in a case in which he had to consider the civil law (*Hansen* v. *Craig and Rose* (1)). The rule periculum rei venditae nondum traditae est emptoris was an exception allowed by the Civil Law, but it was an exception more apparent than real. It was but an equitable recognition that when the price was certain and the subject of the sale specific the substantial interest passed to the buyer though the property remained in the seller till delivery in accordance with the rule traditionibus non nudis pactis dominia rerum transferuntur. In the law of England, though these difficulties were avoided, it has been found necessary to provide for the passing of the risk to the buyer before the property passes to him if the parties so agree. It may be conceded that the parties can agree to some purely artificial allocation of the risk and if they express that agreement in suitable language in the contract it must somehow be given effect. But the parties to commercial contracts are practical people and in those cases in which it has been held that the risk without the property has passed to the buyer it has been because the buyer rather than the seller was seen to have an immediate and practical interest in the goods, as for instance when he has an immediate right under the storekeeper's delivery warrant to the delivery of a portion of an undivided bulk in store or an immediate right under several contracts with different persons to the whole of a bulk not yet appropriated to the several contracts. But in the present case the buyers had no more than a promise to deliver a part of the bulk cargo and the case is typically one for the general rule res perit domino. The sellers' practical and real interest in the goods at risk is also evidenced by clauses in the contract by which they assumed liability for deficiency at discharge on bill of lading weight and guaranteed condition on arrival, and by a clause providing that all average should be for sellers' account. Nor is it immaterial to observe that if the contract had been completely performed the buyers would never have had in their hands any document entitling them to sue underwriters. The fact that on two occasions when there was a total loss the sellers collected the insured value and remitted it to the buyers less a small charge for collection is of no importance, because that was done without the buyers' instructions and, since the sum remitted was not less than the price paid, the buyers had no interest to question the sellers' conduct. The clause obliging the sellers to give to the buyers all policies and certificates of insurance and, if and when called upon for the purpose of claiming upon underwriters, to give a letter certifying that there were no other insurances effected by them and to exchange certificates of insurance for duly stamped policies is not in harmony with a contract intended to be performed as this contract was. It seems, indeed, that this clause and perhaps some others, though appropriate where it was intended that the sale should be implemented by tender of shipping documents or by tender of a delivery order accepted by one in physical possession of the goods, and by a policy or certificate of insurance, do not fit the course of dealing by the parties which by imposing a special meaning on "delivery order" required the sellers to accept a document which was not in law a symbol of the goods. It is not necessary to deny all effect to the clause dealing with policies of insurance and certificates. The buyers had a double interest in the insurance. First, the cost of the policies was a component of the price and they therefore had an interest to know that proper insurance had been effected and at what cost. Second, the marine risk policies would cover the risk from the time the rye was delivered to them by the ship till it reached their warehouse. Beyond these two interests I think that the buyers had no concern with the insurance, unless it is established by other terms of the contract that the parties were agreed that the delivery order was to be inter se equivalent to delivery of the goods.

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(1) (1859) 21 D. 432, 438.

The other subsidiary arguments for the sellers all depend on the attribution of some value to the delivery order. I again question the relevance of the line of argument. It is agreed that the delivery order was not the equivalent of the goods in the sense that its possession conferred on the holder the right of property in the goods valid against all the world. But the consideration for the price is nothing less than that right, unless there are special terms in the contract. If the delivery order had some value otherwise than as the equivalent of the goods the fact has not been proved, and if proved it would be without relevance. If, as is I think plain on the facts found, the delivery order is merely a cogwheel in the machinery for enabling the sellers to transfer the property, it cannot be treated as to any extent consideration for the price, for the consideration for the price is not what the seller does in order to effect the transfer but the actual transfer of the property itself. It is not therefore necessary to consider whether Van Bree intended to bind themselves personally by their signature to any of the undertakings contained in the delivery order. But I can find no evidence of such an intention and I can find no consideration moving from the buyers to Van Bree.

These subsidiary arguments by themselves therefore avail nothing, and the sellers must rely on their contention that the contract by its special terms provides that between the sellers and the buyers the delivery order shall be treated as equivalent to the goods. The sellers laid weight on the description of the price as a c.i.f. price and on the description of the business as c.i.f. business. They also founded on the clause dealing with payment which, they said, treated the delivery order as the equivalent of the bill of lading and the price as paid for it. I think, however, that the explanation of the description c.i.f. in relation to the price and the business carried on by these two parties is that the contract stipulates for a price the components of which were cost, insurance and freight, and that the printed form of the contract used was one which was suitable for an orthodox c.i.f. transaction though also for other transactions not conforming to the c.i.f. model. The use of the label c.i.f. was therefore not significant and I agree with Asquith L.J. (1), that the question is not whether the label was appropriate but what was the effect of the terms of the contract when it was not intended or possible to perform it as an orthodox c.i.f. contract is performed. The stipulation that the price or part of it was

(1) 177 L. T. 648, 653.

to be paid in exchange for a bill of lading and policy or in exchange for a delivery order and certificate does not carry with it the implication that in relation to the rights of the parties inter se the delivery order is to have the effect of a bill of lading, and I can see no reason for reading into the words "in exchange for" anything more than their literal meaning or to read "payment . . . . in exchange for . . . . delivery "order" as meaning "payment for the delivery order." But I think that if the words "delivery order" had had to be construed without the aid of the previous course of dealing, it would have been held to mean a document addressed to and accepted by one in physical possession of the goods. The sellers would then have been bound to tender a document which was in fact the legal equivalent of the goods. The effect of the course of dealing was to release the sellers from that obligation and to entitle them to payment on tender of a document which contains no more than a personal obligation. I do not find evidence in the contract that the parties have undertaken to treat this document as a document of title as between themselves. I would therefore allow the appeal, with costs, both here and in the courts below.

Lord MacDermott. My Lords, in this appeal the question for determination is whether there has been a total failure of consideration. The construction of the contract and its classification as a commercial document were discussed widely in the course of the argument ; but these matters are relevant only in so far as they bear upon that question and it is unnecessary to explore them exhaustively. In a buyer's claim for repayment of the price, which is based on a total failure of consideration, what has to be regarded, as Viscount Simon L.C. pointed out in the *Fibrosa case* (1), is the performance of the seller's promise rather than the promise itself. Moreover, what the seller has done in order to be able to fulfil his obligation is in itself beside the point. To avoid a failure of consideration, his performance, be it complete or partial, must, so to speak, have reached the buyer. If the seller's promise is simply to deliver goods as ordered it will avail him nothing to say that he has grown or manufactured or procured the goods if there has been no delivery of them. Nor will it justify his retention of the price if he shows that the buyer has got something under the contract which was not reckoned in the price. If, for example, tea is bought and paid for at so much a pound, the delivery of an empty tea chest will not, in the absence of some special stipulation, amount for this purpose to a partial performance of the seller's promise. In such event the buyer has not got any of what he paid for and the fact that part of the machinery of fulfilment or some incidental benefit has come to his hands is by the way. These considerations, though important, are not, I think, really in dispute. They may be summed up in the words of Atkin L.J. (as he then was) in *Rowland* v. *Divall* (1), where he describes a total failure of consideration in a sale of goods case thus: "that is to say . . . . the buyer has not got any "part of that for which he paid the purchase money."

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(1) [1943] A. C. 32, 48.

My Lords, whatever the intent of the present contract may be in other respects, it is at least clear that it was an agreement for the sale of a specified quantity of rye "at the price of "$4.025 per 100 kilos c.i.f. Antwerp." It is also clear that the goods were never separated from bulk or appropriated to the contract and that, in fact, the buyers did not obtain physical delivery of an ear of the grain they had ordered. What they did get, in addition to the invoice, which in itself is not a material document for present purposes, was a delivery order, signed by the sellers' Antwerp agents, Belgian Grain and Produce Co. Ld., and addressed not to the ship but to F. Van Bree, S.A., a firm of cargo superintendents who were employed on behalf of the sellers to handle the shipment but were not at any time or in any respect the agents of the buyers. The contract permitted the sellers to substitute a delivery order for a bill of lading in the documents to be presented and I shall assume, having regard to the previous course of business between the parties, that the form of delivery order tendered and accepted in this instance was that contemplated by the contract.

It is plain that in law the handing over of this order did not amount to symbolic delivery and did not pass the property in the goods which remained in the sellers throughout. But it was contended, none the less, that on the true construction of the contract the sellers' performance was as complete as if they had tendered the bill of lading and other documents due to be presented under a normal c.i.f. contract and, accordingly, that the consideration had not failed at all. I cannot accede to that contention. Whatever might have been the position had the sellers delivered a bill of lading

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(1) [1923] 2 K. B. 500, 506.

(and leaving out of account any point about policies or certificates of insurance), I am unable to read the agreed terms as binding the buyers to treat the documents they got as a complete fulfilment of the sellers' obligations. It may be competent for a buyer to agree to accept performance which stops short of delivery, actual or symbolic, but in my opinion that has not occurred here. No doubt the contract contains much that is equivocal so far as its commercial classification is concerned. Some stipulations point to it being an arrival contract; others, such as those relating to insurance, suggest a c.i.f. contract. The terms employed, as well as the practice of the parties, afford some indication that it was intended as a dual purpose document and that its mixed nature is the result. But however this may be, I think its terms contemplate quite clearly delivery of the goods by the sellers to the buyers; and if that is not symbolic it must be physical; and if physical it must be ex ship. The sellers' contention would leave delivery, so to speak, in the air, and cannot be said to echo the intention of the parties. To my mind neither the provisions as to insurance nor the words "in exchange for" suffice to outweigh this consideration. The former are not incompatible with a promise to deliver, and the latter do not necessarily indicate the quid pro quo. A bus fare is given in exchange for a ticket, but what it buys is the journey. I therefore conclude that the handing over of the delivery order was not the performance of the contract but, at most, a step towards performance.

It remains to inquire whether the failure of consideration was partial. On this the sellers advanced several submissions. First of all it was said that the delivery order had some commercial value. This is not found. But assuming such value to have existed the point cannot prevail unless the value was reckoned in the price. I do not think it was. Apart from the elements of insurance and freight the cost was based on the weight of the commodity purchased and that was the grain and nothing else. Then it was submitted that, far from being a mere piece of machinery, the delivery order gave the buyers rights which they had not had before but which were contemplated by the contract, namely those flowing from what the learned Master of the Rolls described (1) as "a personal undertaking and a guarantee by the local "agents of the sellers"—that is by Van Bree. I need not set out again the terms of this undertaking as signed by Van

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(1) 177 L. T. 648, 651.

Bree and appearing in print at the head of the delivery order. Even if it can be regarded as a personal undertaking, I doubt very much if it was paid for by the buyers or if it makes the delivery order more than a cogwheel in the machinery of delivery. But, apart from that, I do not think the findings warrant the assumption that it was a personal undertaking given by Van Bree to the buyers. It may have been given, as a matter of internal arrangement, to the Belgian Grain and Produce Co. Ld. as agents for the sellers ; or, if addressed to the buyers, it may have been given by Van Bree on behalf of the sellers. The last is, in my opinion, the most likely view, and if it is right the sellers' assurance of due performance cannot take their case further. The next point raised on this aspect of the matter was based on the somewhat vague contention that the risk had passed to the buyers. Of course, if a buyer does not get what he has paid for because of some risk which he has agreed to accept he cannot recover the price. But that is not the case here, and the contention under discussion is not, as I understand it, concerned with more than the risk of the goods being lost or damaged. As a matter of stipulation, a buyer who has got neither delivery nor ownership may, no doubt, be made to bear a risk of this kind ; but this will not in itself give him something of that which he has bought. What the position would be if, pursuant to his contract, the seller had taken due steps not only to insure against such risk but also to enable the buyer to recover against the underwriters in the event of the loss thus covered is a question which does not arise for determination here, as, even assuming that the risk passed, no insurance documents were tendered. The buyers did not get them ; Van Bree did, but, as to that, the umpire finds " . . . . the sellers did not, by " delivering to F. Van Bree S.A. certificates of insurance in " respect of these goods, constructively deliver the said " certificates to the buyers, nor did F. Van Bree S.A. at any " time hold the said certificates of insurance . . . . at the " disposal of the buyers." That finding has not been disputed and must be accepted.

On these grounds I am of opinion that the failure of consideration was not partial but total. I would therefore allow the appeal with costs.

Appeal allowed.

Solicitors for appellants : *Richards, Butler & Co.*
Solicitors for respondents : *Thomas Cooper & Co.*

Referred to. KORNER v. WITKOWITZER [1950] 2 K. B. 128

H. L. (E.)*

1948
Nov. 3, 4, 8.

1949
Jan. 19.

[HOUSE OF LORDS]

TYNE IMPROVEMENT COMMISSIONERS. APPELLANTS;

AND

ARMEMENT ANVERSOIS S/A . . . RESPONDENTS.

(THE BRABO.)

Practice—Writ—Service out of jurisdiction—Action to recover cost of wreck removal—Crown and their agents co-defendants in respect of cargo liability—Foreign shipowner—" Proper party "—" Action " properly brought "—R. S. C. 1883, Or. 11. r. 1 (g); r. 4.

By R. S. C., Or. 11, r. 1: " Service out of the jurisdiction of " a writ of summons or notice of a writ of summons may be " allowed by the court or a judge whenever . . . . (*g*) Any person " out of the jurisdiction is a necessary or proper party to an " action properly brought against some other person duly served " within the jurisdiction."

In 1942 a ship belonging to Belgian owners sank so as to become an obstruction to the port of Newcastle-upon-Tyne and the conservancy authority incurred expense in removing the wrecked hull and cargo, afterwards seeking, in the exercise of their statutory powers, to recover the amount from the owners, in respect of the ship itself, and also from the Minister of Supply or alternatively a British company, as owners of the cargo. The writ was " duly " served within the jurisdiction " on the two last-named parties but there was no responsible person within the jurisdiction representing the shipowners on whom it could be served. On an application to issue a concurrent writ for service on the shipowners out of the jurisdiction, evidence was produced on their behalf that the British company, as the consignees named in the bill of lading, were merely the agents of the Minister of Supply and were at no time the owners of the cargo.

Held, that the claim against the parties served within the jurisdiction was in substance made against them merely as agents for the Crown and not against them personally and that, since the Crown itself was free from liability, the action against them must plainly fail. Accordingly the conservancy authority were not entitled to serve the writ out of the jurisdiction.

Per LORD PORTER, LORD SIMONDS, LORD DU PARCQ and LORD NORMAND. In the circumstances the action was not " properly " brought " against the parties duly served within the jurisdiction within R. S. C., Or. 11, r. 1.

Per LORD MACDERMOTT. The action was " properly brought " against the parties duly served within the jurisdiction, but since the claim against those parties could not succeed, this was not a case for the exercise of the court's discretion to grant leave for service out of the jurisdiction under R. S. C., Or. 11, r. 4, by which "no "leave shall be granted unless it shall be made sufficiently to "appear to the court or a judge that the case is a proper one "for service out of the jurisdiction."

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* *Present:* LORD PORTER, LORD SIMONDS, LORD DU PARCQ, LORD NORMAND and LORD MACDERMOTT.

Per LORD PORTER. When, on an application for leave to effect service of a writ out of the jurisdiction, all the facts necessary for a decision are set out by one side or the other and not contradicted, the tribunal must in general decide, on the hearing of the summons, whether or not the claim against the party within the jurisdiction would succeed, though leave should be given when a substantial question of fact is in issue and possibly also when there is an exceptionally difficult and doubtful point of law.

Decision of the Court of Appeal (sub nom. *The Brabo*) [1948] P. 33 affirmed.

APPEAL from the Court of Appeal (Scott, Bucknill and Wrottesley L.JJ.).

The facts, stated by Lord Porter and Lord Simonds were as follows: The appellants were the conservancy authority for the River Tyne and the port of Newcastle-upon-Tyne and the respondents were on March 14, 1942, the owners of the Belgian steamship *Brabo*. On that day she was in collision off the entry to the Tyne and in respect of that collision her owners were held 70 per cent. to blame (see *The Poznan* (1)). After the collision she was towed into the River Tyne where she sank and became an obstruction. She was loaded with a cargo of wood pulp and steel billets and slabs, consigned to the Minister of Supply and to the British Iron and Steel Corporation Ld., a British company. As she constituted an obstruction in the conservancy authority's undertaking, they took steps under their statutory powers to salve such portions of the wreck and cargo as were salvable and to disperse the rest. The work was expensive and difficult and at the material times it was not yet finally completed but it was estimated that the total expense involved might ultimately amount to 250,000*l*.

On March 20, 1946, a writ was issued by the conservancy authority against the shipowners, as first defendants, the Minister, as second defendant, and the British company, as third defendants, claiming from the defendants and each of them the unsatisfied balance and charges and expenses incurred by them in relation to the wreck and the cargo. The Treasury Solicitor accepted service on behalf of the

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(1) (1943) 75 Ll. L. Rep. 53.

Minister and the British company and entered an appearance for them without protest. The shipowners being resident in Belgium, the writ was served on one Niso Aragon, one of their directors, who was then in England. However, on motion by the shipowners, this service was set aside by Pilcher J., who, nevertheless, allowed the writ to be amended by substituting for the address in England at which service had been made, their address at Antwerp, in Belgium. (*Tyne Improvement Commissioners* v. *Armement Anversois S/A* (1).) The conservancy authority made an ex parte application, supported by an affidavit of Victor Henry Smith, a managing clerk in the firm of solicitors acting for them, to the Assistant Registrar in the Admiralty Division for leave to serve the shipowners out of the jurisdiction. The affidavit stated (inter alia) that the action was intended to be brought against the shipowners, as owners of the *Brabo*, " against the " Minister of Supply or alternatively against the British " Iron and Steel Corporation Ld., as owners of a part cargo " of steel billets and slabs and further against the Minister " of Supply as owner of a part cargo of wood pulp then laden " on board the said vessel " (para. 2). The affidavit continued: " The plaintiffs are advised and I verily believe " that they have a good cause of action against each and all " of the defendants " (para. 4). By para. 5: " An action " has already been begun by the plaintiffs by writ duly served " within the jurisdiction upon the Minister of Supply and " the British Iron and Steel Corporation Ld. as defendants " and owners of the part cargoes aforesaid and I am advised " and verily believe that such action has been properly brought " against these defendants and that the defendants Armement " Anversois S/A are necessary and proper parties to this " action." By para. 7: " My means of knowledge and " information . . . . are derived from documents and information in the possession of my firm . . . ." The application was refused on the ground that the shipowners were not " a necessary or proper party " to the action brought against the Minister and the British company. The conservancy authority appealed to Pilcher J. ex parte and on June 6, 1946, he allowed the appeal. He thought that the shipowners were a necessary or proper party to the action and gave leave to issue a concurrent writ for service out of the jurisdiction and to serve notice thereof on the shipowners in

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(1) (1946) 79 Ll. L. Rep. 373.

Antwerp. On August 22, 1946, the shipowners entered a conditional appearance to the writ and at a later date moved to set aside the order of June 6, 1946, on the ground (*a*) that they were not " a necessary or proper party " to the action, and (*b*) that the action against the Minister and the British company had not been " properly brought " against them. They supported their application by an affidavit of Edgar Arbuthnot Fenwick, the senior partner in the firm of solicitors acting for them, in which, in paras. 7 and 8, he stated, referring to the affidavit of Victor Henry Smith : " 7. In so far as the " second named defendant is concerned, I submit that the writ " and the said affidavit disclose no good cause of action in " that the Minister of Supply was dealing with the said cargo " on behalf of the Crown under his powers conferred by the " Ministry of Supply Act, 1939, and that the Minister of " Supply was not at any material time owner of the said " or any part of the said cargo. Alternatively I submit that " any remedy which the plaintiffs may have must be by way " of petition of right. 8. In so far as the third named defen-" dants are concerned I am informed and verily believe that " the bill of lading for the part cargo of steel on board this " vessel at the material time shows the British Purchasing " Commission as the shippers and the said third named " defendants as the consignees and that the said third named " defendants were merely the agents of the Ministry of Supply " and were at no material time the owners of such cargo, " and that accordingly the plaintiffs have no good cause " of action against the third named defendants." Pilcher J. dismissed the shipowners' motion but the Court of Appeal unanimously reversed his decision. The conservancy authority appealed to the House of Lords, by leave of the Court of Appeal.

Carpmael K.C. and *A. J. Hodgson* for the appellants (the conservancy authority). As the conservancy authority stated in their printed case in this appeal, " the short point in this " appeal is whether the action was properly brought against " the second and third defendants, the Minister of Supply " and the British Iron and Steel Corporation Ld." viz., whether the action was " properly brought against some other person " duly served within the jurisdiction " within R. S. C., Or. 11, r. 1 (*g*). The action was properly brought against those two parties and they were duly served. They were proper parties to the action. The test is the position at the time when leave for service out of the jurisdiction is sought and not at some later date. If it be relevant for the court to consider the chances of success in the action it is as at that time that they must be estimated in the light of the plaintiff's then knowledge of the facts. But in law the chances of success or failure are irrelevant, provided the claim was brought bona fide and the parties within the jurisdiction are proper bona fide parties to the action. An action may be properly brought even though its success be uncertain, whether the uncertainty arise from doubt as to the law or the facts in dispute. The test is whether there is a plausible cause of action, whether the plaintiff has reasonable ground for confidence that his claim is sound. Whenever there is a serious and difficult question of law to be argued leave should be granted. In this case the conservancy authority were acting reasonably in suing the parties within the jurisdiction and that is sufficient: see *Ellinger* v. *Guinness, Mahon & Co. Ld.* (1); *Massey* v. *Heynes & Co.* (2); and *John Russell & Co. Ld.* v. *Cayzer, Irvine & Co. Ld.* (3). [They also referred to *Johnson* v. *Taylor Brothers & Co. Ld.* (4); *The Duc d'Aumale* (5); *Washburn & Moen, etc., Co.* v. *Cunard Steamship Co.* (6); *Flower* v. *Rose* (7); and *Witted* v. *Galbraith* (8).] On the evidence no facts are established to show that the action is bound to fail. On the information given, the facts are not sufficiently ascertained for it to be possible to say whether or not the action would succeed against the defendants within the jurisdiction. If the affidavit filed on behalf of the shipowners is to be regarded, it should be taken strictly in favour of the conservancy authority as well as against them. It is defective in that it is exceedingly condensed and does not state the deponent's sources of information. It should not be treated as conclusive. The action is "properly "brought" against both the defendants within the jurisdiction Both come within the definition of "owner" in s. 3 of the Tyne Improvement Act, 1890, and so come within the provisions of s. 42: see also the definition of "owner" in s. 3 of the Harbours, Docks and Piers Clauses Act, 1847. Further, as regards liability, the position of the Minister has been altered by the War Department Stores Act, 1867, s. 20, the Ministry

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(1) [1939] 4 All E. R. 16.
(2) (1888) 21 Q. B. D. 330.
(3) [1916] 2 A. C. 298, 306.
(4) [1920] A. C. 144.
(5) [1903] P. 18.
(6) (1889) 5 T. L. R. 592.
(7) (1891) 7 T. L. R. 280.
(8) [1893] 1 Q. B. 431, 577.

H. L. (E.)

1948

TYNE IMPROVEMENT COMMISSIONERS
v.
ARMEMENT ANVERSOIS S/A
(THE BRABO)

of Supply Act, 1939, s. 2, sub-s. 3, and the Ministry of Supply (Transfer of Powers) (No. 1) Order, 1939. The Minister is debarred from asserting the Crown's immunity in this case: see *Minister of Supply* v. *British Thomson-Houston Co. Ld.* (1). See also *Graham* v. *Public Works and Buildings Commissioners* (2); *Dixon* v. *Farrer* (3); *Roper* v. *Public Works and Buildings Commissioners* (4); *Works and Public Buildings Commissioners* v. *Pontypridd Masonic Hall Co. Ld.* (5); *Minister of Works and Planning* v. *Henderson* (6); *Minister of Health* v. *Belotti* (7); *The Hagen* (8) and the Harbours Docks and Piers Clauses Act, 1847, s. 28. Here the Minister is converted into a principal in respect of the ownership of of the goods; for certain purposes he is the owner. There is nothing novel in this idea. For different purposes there can be two owners. A long line of authorities has established that Ministers, such as this Minister, have been converted into principals who can sue or be sued in respect of goods in their charge. Moreover, it is not incumbent or obligatory on the Crown, in any event, to raise or plead the defence suggested and the Crown is not obliged to do so. The defence that the Crown was not bound by the Tyne Improvement Acts is one which can be waived. As regards the company, there is a good case against them as consignees under the bill of lading. It is thus established that the action is "properly "brought" against either or both of these defendants and accordingly service out of the jurisdiction should be allowed.

A. *J. Hodgson* following. The Court of Appeal regarded as admitted facts which were not admitted. Moreover, they applied as the test, not the reasonableness or bona fides of the conservancy authority's case or argument but their own view of the final result. In this they were wrong. They did not adhere to what was said in *Ellinger* v. *Guinness, Mahon & Co.* (9), where it was laid down that it was enough if there was "a real issue" for the court to try. "Real," according to the Concise Oxford Dictionary, means "objective, genuine ". . . . not . . . . supposed or pretended or artificial." It is the opposite of fictitious. Even assuming that it is not sufficient that a difficult point of law is raised and that it is necessary to establish that the conservancy authority will in all probability succeed in their contentions on the point of law, the action here is "properly brought." They have a cause of action for the amount claimed, under the relevant statutes. The rule of law is stated in Addison on Contracts (11th ed.), p. 455: see *Richardson* v. *Willis* (1). The Tyne Improvement Act, 1890, s. 42, imposes liability on a certain class of persons defined as "owners." The question of law is whether the defendants within the jurisdiction are "owners," as is contended by the conservancy authority. For the definition of "owners" see s. 3 of the Act of 1890, and s. 3 of the Harbours, Docks and Piers Clauses Act, 1847. It is sufficient for the conservancy authority to say that the Minister may be an "owner" for the purposes of the Acts. As to *Minister of Supply* v. *British Thomson-Houston Co. Ld.* (2), this was unchallenged when the action was brought.

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(1) [1943] K. B. 478.
(2) [1901] 2 K. B. 781, 784.
(3) (1886) 18 Q. B. D. 43.
(4) [1915] 1 K. B. 45.
(5) [1920] 2 K. B. 233.
(6) [1947] K. B. 91.
(7) [1944] K. B. 298.
(8) [1908] P. 189, 195.
(9) [1939] 4 All E. R. 16, 22.

Sir William McNair K.C. and *Mocatta* for the respondents (the shipowners). The shipowners' main submissions are as follows: (A.) On the facts as disclosed by the evidence the action cannot succeed in law against either of the defendants within the jurisdiction for the following reasons: (i.) In the statutes of the conservancy authority the Crown is not expressly named nor do they apply to it by necessary implication. (ii.) In those statutes the rights of the Crown are expressly reserved. (iii.) As a matter of common law, both the defendants within the jurisdiction are entitled, when sued, to rely on all the defences open to the Crown. (iv.) In the case of the Minister his right is expressly reserved by proviso (1.) to s. 20 of the War Department Stores Act, 1867, as applied by s. 2, sub-s. 3, of the Ministry of Supply Act, 1939, and Part II. of the schedule to that Act: see also s. 1. (v.) Even if the submissions under the last two heads are held to be wrong, yet these defendants as consignees are neither of them liable to be sued under s. 42 of the Tyne Improvement Act, 1890, by reason of the extended definition of "owner" in s. 3 of that Act.

(B.) If the submissions under (A.) are right no leave to serve the shipowners out of the jurisdiction can be given under R. S. C., Or. 11, for the following reasons: (i.) The right to effect service out of the jurisdiction is an exceptional privilege, an exception to the general rule that jurisdiction depends on the presence of the party within the jurisdiction.

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(1) (1872) L. R. 8 Ex. 69.

(2) [1943] K. B. 478.

(ii.) A case for service out of the jurisdiction must be brought within the letter and spirit of Or. 11: see *Johnson* v. *Taylor Brothers & Co. Ld.* (1); *George Monro Ld.* v. *American Cyanamid & Chemical Corporation* (2); and *Ocean Steamship Co. Ld.* v. *Queensland State Wheat Board* (3). (iii.) The test whether leave should be granted cannot depend on bona fides, since to adopt such a test would be to put a premium on ignorance. While mala fides may be sufficient ground for refusing leave, bona fides cannot be sufficient ground for granting it. (iv.) When all the relevant facts are admitted or proved and none is in dispute and on the correct view of the law those facts do not entitle the plaintiff to success against the defendants within the jurisdiction, leave will not be granted. (v.) The principle that on such an application the court will not try the merits relates to issues of fact and not of law: see *Bloomfield* v. *Serenyi* (4). (vi.) A case cannot be brought within the spirit and letter of Or. 11, by suggesting that parties may waive defences which are open to them: see *Johnson* v. *Taylor Brothers & Co. Ld.* (1), and *John Russell & Co. Ld.* v. *Cayzer, Irvine & Co. Ld.* (5). (vii.) In deciding an application under Or. 11, it is not necessary to postpone till the trial of the action any issue of law raised thereby. The law is always certain and there is only one right answer to any question. An action founded on a wrong view of the law cannot be "properly brought" and in order to decide whether an action is "properly brought" the court must decide the law, however difficult and doubtful the point may seem and the English defendants can join in the argument at that stage. Otherwise a foreigner who in his own courts would not be liable could be brought into the English courts and joined with English defendants against whom it ultimately appeared that there was no cause of action. That would be absurd and unjust. Accordingly in the present case the point of law must be determined at this stage and the decision must be adverse to the conservancy authority.

The shipowners are not necessary or proper parties to an action "properly brought" within Or. 11, r. 1 (*g*) because the action against the defendants within the jurisdiction must fail and therefore the action cannot be "properly

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(1) [1920] A. C. 144.
(2) [1944] K. B. 432.
(3) [1941] 1 K. B. 402.
(4) [1945] 2 All E. R. 646, 649.
(5) [1916] 2 A. C. 298.

"brought" against them. The claim is purely statutory and the Crown is not liable under the Acts relied on: see *Bombay Province* v. *Bombay Corporation* (1). Moreover, those Acts expressly save the Crown's rights: see Harbours, Docks and Piers Clauses Act, 1847, ss. 28 and 99, and Tyne Improvement Act, 1934, s. 3, sub-s. 1, and s. 81: see also the Tyne Improvement Act, 1865, s. 91. If these Acts do not apply to the Crown, neither do they apply to the Minister, who was the servant or agent of the Crown, sued in his official capacity or for an act done by him as the servant or agent of the Crown: see *Roper* v. *Public Works and Buildings Commissioners* (2); *Works and Public Buildings Commissioners* v. *Pontypridd Masonic Hall Co. Ld.* (3); *Administrator of Austrian Property* v. *Russian Bank of Foreign Trade* (4); *Hornsey Urban District Council* v. *Hennell* (5); *Pearson* v. *Holborn Union Assessment Committee* (6); *Chare* v. *Hart* (7); and *Gorton Local Board* v. *Prison Commissioners* (8). These authorities establish that, if the statutes in question do not bind the Crown, they do not bind the Minister of Supply or the company in respect of anything done by them in an official capacity. In relation to the cargo they were both acting as agents for the Crown and there was no liability on them either in contract or tort. The property was vested in them for the purposes of the Crown and they have not departed from that. *Minister of Supply* v. *British Thomson-Houston Co. Ld.* (9), was not wrong in respect of the point which it decided but the limitations placed on it in the present case by Scott L.J. (10) were correct. A review of the Acts confirms that the conservancy authority could not recover from the Minister or the company in respect of the wreck removal: see Removals of Wrecks Act, 1877, s. 4; Tyne Improvement Act, 1886, eighth recital, and ss. 2 and 10; Tyne Improvement Act, 1890, ss. 2, 3 and 42 and Tyne Improvement Act, 1934, s. 2, sub-s. 2, s. 3, sub-s. 3 (*v*). As to the incorporation in these Acts of the Harbours, Docks and Piers Clauses Act, 1847, see the Tyne Improvement Act, 1934, s. 3, sub-s. 1, and sch. II., Part I., repealing s. 4 of the Act of 1861, s. 3 of the Act of 1865, and s. 2 of the Act of 1886, the effect of which

(1) [1947] A. C. 58, 62.
(2) [1915] 1 K. B. 45.
(3) [1920] 2 K. B. 233.
(4) (1931) 48 T. L. R. 37.
(5) [1902] 2 K. B. 73, 75, 76, 80.
(6) [1893] 1 Q. B. 389, 392, 396.
(7) (1919) 88 L. J. (K. B.) 833.
(8) [1904] 2 K. B. 165 *n*.
(9) [1943] K. B. 478.
(10) [1948] P. 33, 45.

is that the interpretation of the Act of 1847 now depends on s. 3 of the Act of 1934. As to the definition of "owner" in s. 3 of the Act of 1890, the question in this case is purely one of the interpretation of its true effect. One must have regard to the express purpose of the Act, and from the recitals it is plain that the definition was related to the collection of rates and dues. Even if this were not plain on the language used, any construction of the definition which made it applicable to s. 42 would lead to results so absurd that it would have to be rejected.

Under Or. 11, r. 1 (*g*), no leave should be given here. It is a limiting order conferring an exceptional privilege in certain limited circumstances: see *Société Générale de Paris* v. *Dreyfus Brothers* (1); *Johnson* v. *Taylor Brothers & Co. Ld.* (2) *George Monro* v. *American Cyanamid & Chemical Corporation* (3) and *Ocean Steamship Co. Ld.* v. *Queensland State Wheat Board* (4). Under Or. 11, there are certain specific cases where the nature of the action itself requires service out of the jurisdiction but if the English defendant is not liable, it cannot be necessary to bring a foreigner here in order to determine the case. An action cannot be "properly brought" if it is one which is bound to fail. There is no reported case where leave to effect service out of the jurisdiction has been given when the facts are not disputed and in law the plaintiff is unable to recover against the English defendant: see *Call* v. *Oppenheim* (5); *Flower* v. *Rose* (6); *Bloomfield* v. *Serenyi* (7); and *Witted* v. *Galbraith* (8), this last case being a strong one in favour of the shipowners. Since the difficulty of a point of law is always a matter of opinion on which different minds think differently, any test depending on the degree of difficulty would be vague and unsatisfactory. Leave should not be given merely becuase the point of law on which liability depends is said to be difficult. Even assuming that there is power under Or. 11 to grant leave, this is not a case in which the power ought to be exercised: see Or. 11, r. 4. The factor which weighs conclusively against the exercise of the court's discretion to grant leave is that, if there is no cause of action against the defendants within the jurisdiction, the shipowners would only be brought here because of their association with other persons who had a complete defence.

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(1) (1885) 29 Ch. D. 239, 242-3.

(2) [1920] A. C. 144, 152, 153.

(3) [1944] K. B. 432, 436, 437, 439, 441.

(4) [1941] 1 K. B. 402, 417.

(5) (1885) 1 T. L. R. 622.

(6) 7 T. L. R. 280.

(7) [1945] 2 All E. R. 646.

(8) [1893] 1 Q. B. 577.

Carpmael K.C. in reply. Reliance is placed on *Ellinger* v. *Guinness, Mahon & Co.* (1). The action was originally brought against all the defendants when all were thought to be resident here. There was no question of joining the defendants within the jurisdiction for the purpose of bringing in the foreigners. As to the definition of " owner " in s. 3 of the Tyne Improvement Act, 1890, it is " in relation to goods " and is not confined to rates and dues. Under s. 42 there is a joint and several liability in the defendants. In the cases cited on behalf of the shipowners, the following passages should be noted: *Société Générale de Paris* v. *Dreyfus Brothers* (2) and *Monro* v. *American Cyanamid & Chemical Corporation* (3). *Minister of Supply* v. *British Thomson-Houston Co. Ld.* (4), was rightly decided and establishes that when leave was sought there was a perfectly good claim against the defendants within the jurisdiction. The action was " properly brought " within the ordinary meaning of the words. The test has never been laid down as being that the action must succeed. As to the company, no reason has been shown and no authority has been given to establish that they would be entitled to take the point that as agents for the Crown they are entitled to all the immunities of the Crown. Immunity is enjoyed by a servant of the Crown but not a general agent.

The House took time for consideration.

Jan. 19, 1949. LORD PORTER. My Lords, this is an appeal from a judgment of the Court of Appeal which reversed a judgment of Pilcher J. who had given leave to the appellants under R. S. C. Or. 11, r. 1 (*g*), to issue a concurrent writ for service out of the jurisdiction upon the respondents as necessary and proper parties to an action properly brought against the Minister of Supply in this country and the British Iron and Steel Corporation Ld., which is an English company and is hereafter referred to as " the company." The Court of Appeal withdrew that leave but granted leave to the appellants to appeal to your Lordships' House. The argument on which the appellants claimed that leave should be granted turns on the true appli-

(1) [1939] 4 All E. R. 16, 22.
(2) (1887) 37 Ch. D. 215, 218, 225.
(3) [1944] K. B. 432, 436-7.
(4) [1943] K. B. 478.

cation of R. S. C. Or. 11, r. 1 (*g*), to the facts of this case. That rule is contained in the following terms: "Service out "of the jurisdiction of a writ of summons or notice of a writ "of summons may be allowed by the court or a judge "whenever . . . . (*g*) Any person out of the jurisdiction "is a necessary or proper party to an action properly brought "against some other person duly served within the juris-"diction." The questions for your Lordships are: (1.) Whether the action was "properly brought" against the other two defendants, and (2.) whether the respondents are necessary or proper parties to an action brought against either of the two other defendants. The facts, so far as they are known, are to be found in an affidavit by Mr. Fenwick, the solicitor to the respondents. This affidavit is, it is true, technically defective in that it does not state the sources of information relied on and it is in very condensed form, but no objection was taken on either ground at the original hearing and therefore in my view full effect must be given to its contents.

In these circumstances it is said on behalf of the respondents that they are not necessary or proper parties to an action properly brought in England because the action against the two parties domiciled in England must fail: it is therefore not properly brought against those two parties within the meaning of the rule.

For the appellants it is urged that no facts are established such as to show that the action must fail and in any case an action may be properly brought though its success is uncertain, whether that uncertainty is due to a doubt as to the law or as to the facts in dispute. Indeed they go further and maintain that if the claim was brought bona fide, that is enough; and its chances of success or failure are irrelevant. As a further contention they submitted that if the possibility of success or failure was material at all it was not the objective possibility which had to be determined. The chances, they asserted, must be judged solely from the consideration of the appellants' knowledge of the facts at the date of the issue of the summons to serve the concurrent writ and not at some later date such as the date of Mr. Fenwick's affidavit or the hearing of the summons.

My Lords, the earlier contentions raise questions of some difficulty which will have to be considered later, but I cannot accept the last two suggestions. If the bona fides of the applicant were the only test, then the less competent the advice he received and the less his capacity of judging accurately for himself, the greater would be his opportunity of obtaining leave to serve a writ out of the jurisdiction, and if his knowledge at the date of the issue of a summons for leave is the vital question, then the greater his ignorance, the better his chances of success. Both these considerations in my view point to the fact that neither bona fides nor personal knowledge are the true criteria. Some chance of success at least seems to be necessary and a knowledge of the true facts so far as ascertainable must, I think, be required : the tribunal should not be confined to a consideration of the facts as known to one party only, whether at the date of the issue of the summons or at the time when it was heard. The criterion must be objective, not subjective. But this view still leaves open the difficult question, what cases can be said to be properly brought within the jurisdiction ? Is it enough that there is a reasonable doubt either in law or in fact as to what the result of the case against the defendants within the jurisdiction may be, or must the court decide on the hearing of the summons whether the plaintiffs will succeed against them or not ?

My Lords, where all the facts necessary for a decision are set out by one side or the other and not contradicted, I think that the tribunal must make up its mind on the hearing of the summons, at any rate where the law is plain. Primarily the jurisdiction of the courts in this country is territorial in the sense that the contract or tort sued upon must have some connexion with this country or the defendant must be served here. To this principle Or. 11, r. 1 (*g*) is an exception and enables foreigners domiciled abroad to be impleaded in this country provided an action is properly brought against someone duly served within the jurisdiction and the party outside the jurisdiction is a necessary or proper party to that action. The rule is not only an exception to but also an enlargement of the ordinary jurisdiction of the court and should not, in my opinion, be given an unduly extended meaning. The observation of Farwell L.J. in *The Hagen* (1), and of Lord Sumner in *John Russell & Co. Ld.* v. *Cayzer, Irvine & Co. Ld.* (2), both quoted by Scott L.J. (3), point out the care which should be taken before the jurisdiction is exercised.

(1) [1908] P. 189, 201.

(2) [1916] 2 A. C. 298, 304.

(3) [1948] P. 33, 39.

No doubt it is in some circumstances desirable that persons not usually subject to the jurisdiction should be brought before our courts in order that a case may be fairly and fully disposed of, but the right to add the foreigner should be sparingly used, more particularly in a case where the party within the jurisdiction may not be subject to any liability and therefore the action would fail as against the only person or persons who could be sued here were it not for the rule. In theory this objection has as great force where the law is in dispute, as it has where the facts in respect of which liability is asserted are in issue, inasmuch as the defendant within the jurisdiction may in either case be held to be blameless. But in practice the position differs, since a decision upon the facts may involve a long and complicated consideration of the weight of evidence after the examination of a larger or smaller number of witnesses, whereas the law, if, as in the present case, the facts are ascertained, can often be decided as well at the hearing of a summons as it can in a formal trial.

These seem to me to be the general considerations which should guide your Lordships in coming to a decision, but a body of authority has been cited and it has still to be determined what effect it has on the principle at issue. It is not in dispute that, if in substance those within the jurisdiction are made parties, without a plausible cause of action, merely that their presence may be used to support an application to issue a writ against persons without the jurisdiction, leave will not be granted. *Flower* v. *Rose* (1), and *Witted* v. *Galbraith* (2), are illustrations of this attitude. But there are cases where there is a genuine and substantial doubt whether the parties within the jurisdiction are liable or not, in which leave has been given. *Massey* v. *Heynes & Co.* (3), in which those within the jurisdiction were sued for breach of warranty of authority and those without on the alternative plea that they had in fact authorized the contract said to be unwarranted, is perhaps as good an example as can be chosen, since in that case, the claims being alternative, it was impossible that the action should succeed against the one unless it failed against the other. Nevertheless, as was pointed out in *Société Générale de Paris* v. *Dreyfus Brothers* (4), it is not enough that the form of action and the nature of the relief sought bring it within Or. 11. The plaintiff

(1) 7 T. L. R. 280.
(2) [1893] 1 Q. B. 577.
(3) (1888) 21 Q. B. D. 330.
(4) 37 Ch. D. 215, 225.

must show to the satisfaction of the court that he has a probable cause of action. *Bloomfield* v. *Serenyi* (1), goes further and distinguishes between cases where the facts are ascertained and the only issue is one of law and those which involve the determination of facts. " The court," it was held " would " . . . . without trying to determine the merits of the action, " consider all the relevant documents, even though that might " involve some investigation," and MacKinnon L.J. in terms stated (2) : " It has been rightly said in some of these cases " that on such an application as this the court cannot try " the merits of the action. That is quite true, but I think " that means trying and determining disputed facts. Where " on such an application the court considers the admittedly " relevant documents without the necessity of deciding " disputed matters, I do not think that is trying the merits " of the action within the meaning of the warning not to do " so." It is no doubt true that in certain cases where no question as to the exact limitation of the court's powers have come in issue, expressions have been used tending to show a very wide discretion in the judge, e.g., in *Ellinger* v. *Guinness, Mahon & Co.* (3), Lord Morton, then Morton J., said : " I do " not think it is part of the function of the court, in considering " whether an action is ' properly brought ' against a party " within the jurisdiction, to arrive at a conclusion as to " whether the plaintiff will or will not succeed against that " party. It is enough if the court is satisfied that there is " a real issue between the plaintiff and that party which the " plaintiff may reasonably ask the court to try." So, too, in *Massey* v. *Heynes & Co.* (4), Lord Esher M.R. uses as his test : " Supposing both parties had been within the jurisdiction " would they both have been proper parties to the action ? " And Wills J. (5) speaks to the like effect. My Lords, the language used in each case was, no doubt, sufficiently accurate in regard to the circumstances in connexion with which it was used, but I cannot myself subscribe to the wide interpretation which is sought to be derived from it in reference to all cases. One may say generally that serious disputes of fact cannot as a rule be decided upon a summons, whereas questions of law can, except perhaps in exceptional and complicated cases. Ultimately, I think, the granting or with-

(1) [1945] 2 All E. R. 646.

(2) Ibid. 649.

(3) [1939] 4 All E. R. 16, 22.

(4) 21 Q. B. D. 330, 338.

(5) Ibid. 335.

holding of leave must be a matter of discretion, but in exercising it the considerations, which I have dealt with, must be borne in mind. It is not enough to say that there is an arguable point of law because, as in the present case, a series of legislative enactments has to be considered and collated. The question is whether the law is plain as a result of comparing them and analysing their effect. If after a careful scrutiny the law is plain this House will interfere with the judge's discretion as it did in *Johnson* v. *Taylor Brothers & Co. Ld.* (1).

What then is the legal position in the present instance? Pilcher J. thought, in my opinion rightly, that the action against the defendants within the jurisdiction would fail, but held the view that where the inquiry involved a consideration of an interwoven series of provisions in Acts of Parliament, there would, as a rule, be sufficient doubt and there was in this case sufficient doubt to warrant the giving of leave. In my opinion, these circumstances do not constitute a sufficient ground for granting leave. Where there is a substantial question of fact in issue no doubt leave should be given. It may even be that the existence of an exceptionally difficult and doubtful point of law would of itself be enough. In the present case, however, when the various Acts and provisions are collated the answer is clear. The cause of action is statutory only. The right of the appellants to charge the shipowners with the expense of dispersing the wreck is to be found in the various Tyne Improvement Acts, but I need only quote from the Act of 1890, since it contains in substance the material provisions with which your Lordships are concerned. The principal section is s. 42. The material words are: ". . . . the Commissioners may . . . . sell break "up or otherwise dispose of or may cause to be sold broken "up or otherwise disposed of any wreck or any vessel or thing "sunk stranded or abandoned or any obstruction within "the port and may recover and receive the moneys . . . . "arising therefrom and may retain out of such moneys any "expenses incurred by them . . . . in any manner or for "any purpose whatsoever in respect or on account of such "wreck vessel thing or obstruction or any part thereof . . . . "rendering the balance (if any) to the person who was the "owner of such wreck vessel thing or obstruction immediately "before it became a wreck or obstruction . . . . and if there

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(1) [1920] A. C. 144.

" be no such moneys or if any such moneys be insufficient " to cover all of such expenses and charges the Commissioners " may recover such expense and charges or the unsatisfied " balance thereof from such person . . . ." By s. 3 of the same Act " 'owner' when used in relation to goods unless " there be in the subject or context something repugnant " to or inconsistent with such construction shall include " as the case may be the consignor consignee importer shipper " exporter receiver broker or agent for sale or custody . . . ." I need not quote further from the several Acts, whether successive or supplemental, dealing with the same matter. The section quoted, in my opinion, sufficiently raises the questions at issue. In the appellants' contention, the Minister and the company must come within one of the classes included in the definition of " owner " and are therefore properly the subjects of an action brought against them after due service within the jurisdiction. If no question arose as to the position of these two parties as agents for the Crown the claim would be incontrovertible. But the claim is, in my view, in substance against the parties as agents for the Crown and not against them personally. The Minister plainly is such agent and, though Mr. Fenwick's affidavit is perhaps a little reticent in the matter, I think it sufficiently emerges that the British Iron and Steel Corporation Ld. dealt with and held the property as agents of His Majesty and in no other capacity.

It was sought to be contended that the position of the Minister had been altered by the provisions of s. 20 of the War Department Stores Act, 1867, in conjunction with s. 2, sub-s. 3, of the Ministry of Supply Act, 1939, and the Ministry of Supply (Transfer of Powers) (No. 1) Order, 1939. Those provisions in the case of the Minister of Supply provide that he may bring or defend in his own name any action concerning any stores belonging to or supplied by or for the purpose of the Minister. But the original section contains the proviso, commonly found in Acts which may affect the Crown, retaining its privileges and prerogatives. The result of this saving of His Majesty's right is, as I think, to enable the Minister to be sued without the necessity of a petition of right but not to debar him from the protection which in the particular case the Crown itself would have had. That the Crown itself would have been free from liability is, in my opinion, abundantly plain. The local Acts conferring powers upon the appellants preserve the privileges of the Crown throughout.

Section 99 of the Harbours, Docks and Piers Clauses Act, 1847, which is incorporated in the local Acts up to 1934 by s. 3, sub-s. 1, of the Tyne Improvement Act of that year, and s. 81 of the latter Act, make this clear. But indeed the general principles of the law of this country would produce the same effect and in this connexion I need only refer to *Bombay Province* v. *Bombay Corporation* (1). My Lords, in these circumstances it is immaterial that in the relevant statutes the word "owner" is given an extended meaning. The Crown still is not bound by the extension and, even if it were, is under no obligation to pay the charges. I am not myself fully persuaded, in any case, that the extended meaning given to "owner" applies to the case of those against whom the Acts give a right to recover the cost of dispersion of a wreck or its cargo. The answer to that question may well await a case in which such a claim must be decided. In this case, however, the action against the two parties within the jurisdiction must plainly fail and in those circumstances I cannot think that the action is properly brought against them within the meaning of Or. 11, r. 1 (*g*).

I would dismiss the appeal with costs.

LORD SIMONDS. My Lords, this appeal from a judgment of the Court of Appeal, which reversed a judgment of Pilcher J. dismissing a motion by the respondents for an order to set aside an order made by the same learned judge by which he gave leave to the appellants to issue a concurrent writ for service out of the jurisdiction and to serve notice thereof on the respondents in Belgium, raises a procedural question of some difficulty. The relevant facts, it must be said at once, cannot be regarded as seriously in dispute.

The appellants made an ex parte application supported by an affidavit of Mr. V. H. Smith, a managing clerk in the firm of solicitors acting for the appellants, to the Assistant Registrar in the Admiralty Division for leave to serve the respondents out of the jurisdiction. This application was refused on the ground that the respondents were not "a "necessary or proper party" to the action brought against the second or third defendants. The appellants appealed to Pilcher J. ex parte and on June 6, 1946, he allowed the appeal. He thought that the respondents were "a necessary or proper "party" to the action and gave leave to issue a concurrent writ out of the jurisdiction and to serve notice thereof on the respondents at Antwerp. It will be observed that, at this stage, the question which has been so much debated in this House whether the action was "properly brought" against the second and third defendants had not yet emerged. But it was about to emerge and it is convenient to remind your Lordships that leave to serve out of the jurisdiction was given under Or. 11, r. 1 (*g*) which provides that:—"Service out of the jurisdiction of a writ of summons or notice "of a writ of summons may be allowed by the court or a "judge whenever . . . . (*g*) Any person out of the jurisdiction "is a necessary or proper party to an action properly brought "against some other person duly served within the juris-"diction." On August 22, 1946, the respondents entered a conditional appearance to the writ and at a later date moved to set aside the order of June 6, 1946, on the grounds (*a*) that they were not "a necessary or proper party" to the action and (*b*) that the action against the second and third defendants had not been "properly brought" against them. They supported their application by an affidavit of Mr. E. A. Fenwick, the senior partner in the firm of solicitors acting for the respondents. I cannot, my Lords, deny that this affidavit both in form and substance leaves something to be desired. But it was not challenged and I do not think your Lordships would be justified in coming to any other conclusion than that the whole of the cargo was the property of the Crown vested in the second or third defendants for the purposes of the Crown. If there was any doubt upon this matter, which I do not think there was, it should have been cleared up by the appellants, whose duty it was on an application for leave to serve out of the jurisdiction to place all relevant facts before the court.

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(1) [1947] A. C. 58.

The question, then, was, and is, whether on these facts the appellants bring their case within the terms of the rule, and further, whether, if they do, the court should exercise its discretion in their favour. On this question Pilcher J. decided in favour of the appellants and dismissed the respondents' motion, but the Court of Appeal (Scott, Bucknill and Wrottesley L.JJ.) unanimously reversed his decision, holding that the action was not "properly brought" against the second or third defendants, and that accordingly the conditions of the rule had not been satisfied.

On the respondents' first ground of objection, I do not think it necessary to say more than that, if I thought that the second ground of objection failed and that the action was properly brought against the second or third defendants, I should hesitate to say that the respondents were not at least a proper party to the action.

It was on the second ground of objection that the Court of Appeal founded their decision and I find myself in agreement with them. I do not propose to attempt an exhaustive definition of the words " action properly brought " : to do so would probably lead to the use of words which would themselves require elucidation. But, in considering whether in any particular case an action can be regarded as properly brought within the meaning of the rule, I keep in mind the principles (to which Scott L.J. has referred (1)) laid down not for the first time by Farwell L.J. in *The Hagen* (2). What, then, is here the basis of the respondents' objection to being served with process out of the jurisdiction ? It is simply that on the facts, which cannot fairly be regarded as in dispute, the action against the second and third defendants is not sustainable in law and is bound to fail, and that, if so, it cannot be regarded as properly brought against them.

My Lords, I will first briefly examine the contention that the appellants' action against the second and third defendants is bound to fail—briefly, because I think it is so clear as not to require elaboration. The appellants' claim is based on their statutory powers and in particular the provisions of s. 42 of the Tyne Improvement Act, 1890. Since on the facts, which I hold to be undisputed, the cargo here in question is the property of the Crown vested in its servants or agents, the appellants' claim, so far as it relates to that cargo, can only succeed if they can establish that the Crown is bound by the statutory provisions upon which they rely. But not only is the Crown bound neither by express mention nor by necessary implication, but in addition in every relevant Act the rights of the Crown are expressly preserved. I need do no more than mention s. 99 of the Harbours Docks and Piers Clauses Act, 1847, which by s. 3, sub-s. 1, of the Tyne Improvement Act, 1934, is deemed to be incorporated with each of the Tyne Improvement Acts, 1850 to 1934, and s. 81 of the Act of 1934 itself. From such a conclusion, which is supported by abundant authority (I will refer only to *Hornsey Urban District Council* v. *Hennell* (3), and the recent case of

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(1) [1948] P. 33, 39.

(2) [1908] P. 189, 201.

(3) [1902] 2 K. B. 73.

Bombay Province v. *Bombay Corporation* (1)), the appellants seek to escape by pointing to s. 20 of the War Department Stores Act, 1867, as applied to the Minister of Supply by s. 2, sub-s. 3, of the Ministry of Supply Act, 1939, and the Ministry of Supply (Transfer of Powers) (No. 1) Order, 1939 (S.R. & O. No. 877 of 1939). This section, as adapted to the Minister of Supply, provides in effect that he may in his own name bring or defend any action concerning any stores belonging to or supplied by or for the purposes of the Minister. It has its own significant proviso which (as adapted) provides that "(1.) Nothing herein shall take away or abridge in or in relation "to any such action, suit, or proceeding any legal right, "privilege, or prerogative of the Crown; and in all such "actions, suits, and proceedings, and in all matters and "proceedings connected therewith, the [Minister of Supply] "may exercise and enjoy all such rights, privileges, and "prerogatives as are for the time being exercised and enjoyed "in any proceeding in any court of law or equity by the Crown, "as if the Crown were actually a party to such action, suit, or "proceeding." I can see no justification for the suggestion that in an action brought against the Minister of Supply he is debarred from asserting the immunity of the Crown from claims brought under a statute which not only does not purport to bind the Crown but expressly exempts it. Nor, on an examination in their context of the observations of MacKinnon L.J. and Goddard L.J. in *Minister of Supply* v. *British Thomson-Houston Co. Ld.* (2), do I think that those learned judges intended to cast any doubt on the question. If they did, such observations must be regarded as obiter and per incuriam. All that was decided in that case was that the Minister of Supply could be sued by way of counterclaim for breach of contract. I must mention briefly one further contention of the appellants. It was, as I understand the argument, urged that, whether or not the Crown was the owner of the cargo in question, yet by virtue of an extended definition of the word "owner" to be found in s. 3 of the Harbours Docks and Piers Clauses Act, 1847, and s. 3 of the Tyne Improvement Act, 1890, the second and third defendants (or at any rate the third defendant) were to be regarded as "owners" within the ambit of s. 42 of the Act of 1890. I am by no means satisfied that this initial step is made good, but, whether it is or not, inasmuch as the Act does not bind the

(1) [1947] A. C. 58.

(2) [1943] K. B. 478.

Crown, it does not affect the right of its servants and agents, by whatever name the Act may choose to call them, to assert its and their immunity.

I come then to the conclusion that this action is bound to fail against the second and third defendants, and it appears to me that once a court has come to that conclusion it cannot say that none the less the action is "properly brought" against them so as to permit service of a writ out of the jurisdiction upon another party. I am, as I have already said, very conscious of the difficulties that arise from any attempt at exhaustive definition, but I think that certain propositions may fairly be laid down. First, I would dismiss the contention that the action is "properly brought" if it is brought bona fide: as my noble and learned friend Lord MacDermott observed in the course of the argument, the rule is not designed to place a premium on folly or ignorance. The test cannot be a subjective one. But I agree that, if it were brought mala fide, that would be fatal. Secondly, I do not think that the court ought to assume that the defendants within the jurisdiction would not avail themselves of any defence open to them. In this case it was suggested that the second and third defendants might not assert the immunity of the Crown. But if one valid line of defence is assumed to be abandoned, so might another, until at last any action may be deemed to be properly brought because the defendants might throw down their arms and run away. Such an argument is inconsistent with the principle laid down in this House by Lord Sumner in *John Russell & Co. Ld.* v. *Cayzer, Irvine & Co. Ld.* (1), that "the words 'properly brought' "enure to the protection of the person out of the jurisdiction "whom it is proposed to serve with process." Thirdly, I do not accede to the suggestion that the court, which has to consider whether leave to serve out of the jurisdiction should be given, or alternatively to consider whether an order giving such leave should be set aside, is concerned only with the facts or indeed the law as they existed or were assumed to be at the date of the issue of the writ or of service of the writ on the defendants within the jurisdiction. It is in my view consistent with the international comity, which must be observed in the application of this order, that the court should have regard to the facts and the law as at the date of hearing: see *Société Générale de Paris* v. *Dreyfus Brothers* (2).

(1) [1916] 2 A. C. 298, 304.

(2) 37 Ch. D. 215.

Fourthly, if on the available materials the court comes to the conclusion that the action against the defendants within the jurisdiction must fail, it must equally conclude that the action is not properly brought. Here arises the difficulty. For at once the question will be asked, " Is the court at this " stage compelled to come to any conclusion at all ? Cannot " it say that there is a serious and difficult question to be " argued and that the action is properly brought for the purpose " of arguing it ? " This was in effect the contention of the appellants which found favour with Pilcher J. in this case. I would not deny that there might be cases, particularly where issues of fact are involved, in which the court would be justified in taking such a view and I do not invite your Lordships to decide that, whenever the defendant out of the jurisdiction takes upon himself the burden of showing that the action must fail against the defendants within the jurisdiction, the court is bound to make an adjudication which in any case cannot be final as between the plaintiff and the latter defendants. But I would say at least negatively that, where the defendant out of the jurisdiction does take upon himself that burden, the court should not easily be deterred by any apparent difficulty or complexity of subject matter from considering and, if it can do so at that stage, forming an opinion on the question whether the action is bound to fail against the defendants within the jurisdiction. If, having done so, the court answers that question in the affirmative, then it must conclude that the action is not " properly " brought." That I conceive to be the position in this case and I would affirm the order under appeal accordingly.

I should finally observe on some of the cases which have been cited. In *Witted* v. *Galbraith* (1), the Court of Appeal, overruling a decision of the Divisional Court, set aside an order for service out of the jurisdiction and in the course of his judgment Lindley L.J. said : " . . . . there is no plausible " cause of action against the brokers. . . . . It is not a bona " fide case of an action properly brought against a person " who has been served within the jurisdiction." Upon this it was urged that, assuming bona fides, the test of an action properly brought was whether there was a " plausible " cause of action. It is, I think, sufficient to say that Lindley L.J. was not considering the problem which now faces your Lordships and that it is not necessary to speculate whether he would have thought a cause of action plausible which was demonstrated to be bad in law. In the Divisional Court in the same case Hawkins J. had said (1): "I think that, if a plaintiff, "who is acting bona fide, has anything like a semblance "of a cause of action against a person who is within the "jurisdiction, he is entitled to issue a writ against that person "and serve it on him, and may then obtain leave to serve "any person out of the jurisdiction who is a necessary or "proper party to such action." This statement is, I think, far too wide, but it must in any case be qualified by saying that, if leave is so granted, it must be rescinded when the defendant out of the jurisdiction has shown that it is but a semblance and that the action is bound to fail. In *Ellinger* v. *Guinness, Mahon & Co.* (2), Morton J. (as he then was) thought that the condition of the rule was satisfied if there was "a real issue" to be tried. I cannot accept this test if it means that the defendant out of the jurisdiction is to be denied the opportunityof showing that the issue can as a matter of law be resolved in one way only. It may well be that, where there is conflicting evidence of fact, it is only at the trial of the action that the issue can be determined. That may be the misfortune of the defendant out of the jurisdiction. But if, the only real issue being an issue of law, he can satisfy the court what the answer must be, then he is entitled to say that he cannot be brought to trial in a jurisdiction to which he is not generally subject.

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(1) [1893] 1 Q. B. 577, 579.

I have so far considered only the question what is the meaning of the words "action properly brought" where they occur in the rule, but there still remains the question how, assuming the action to be properly brought, the discretionary jurisdiction should be exercised. The two questions will often be found to interlock. For instance, if it were the true view that an action is properly brought if the plaintiff brings it bona fide and there is a "plausible cause of action" or "a real "issue to be tried," yet the court may and, as I think, should as a rule allow the defendant out of the jurisdiction to try to show that the case against the defendants must fail and, if he succeeds in doing so, then in its discretion set aside the order of service. Thus in this case, whatever view I took of the construction of the rule, I should have no hesitation in saying that on the materials adduced by the respondents the court should in the exercise of its discretion set aside the order.

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(1) [1893] 1 Q. B. 431, 434.

(2) [1939] 4 All E. R. 16, 22.

I will conclude by saying that, whether in considering the interpretation of the rule or in exercising the discretion that arises when a case is brought within it, the underlying and guiding principle is that which was long ago stated by Pearson J. in *Société Générale de Paris* v. *Dreyfus Brothers* (1), that it " ought always to be considered a very serious question " . . . . whether this court ought to put a foreigner, who owes " no allegiance here, to the inconvenience and annoyance " of being brought to contest his rights in this country . . . .".

I agree that the appeal should be dismissed.

Lord du Parcq. My Lords, it is correctly stated in the appellants' case that " the short point in this appeal is whether " the action was 'properly brought' against the second " and third defendants, the Minister of Supply and the British " Iron and Steel Corporation Ld." At first sight the point so stated has a pleasing appearance of simplicity. It is perhaps less simple than it looks, but it may be true to say that no words or phrases long retain their simplicity when they are exposed to a process of delicate, prolonged and remorseless dissection.

Before I deal with the narrow question which is presented to your Lordships, I would add that it is necessary to keep in mind two further matters which are at once elementary and important ; first, that those applying for leave are under an obligation to make the fullest disclosure of all relevant facts to the court, and, secondly, that even if they are able to bring their application within the strict terms of the rule, the granting of leave is discretionary, and there may be grounds which will justify the court in refusing it.

My Lords, I have no intention of paraphrasing in my own language the apparently simple words " properly brought." One is unlikely to find other words which are precisely synonymous with them, and it is useless to substitute for them words which may have a slightly different meaning. I will confine myself to considering what effect ought to be given to these precise words, in their context, with reference to the case before the House. There is, I think, general agreement that the context makes the purpose of the introduction of the words plain enough. The foreigner is not to be brought

(1) 29 Ch. D. 239, 24-23.

before our courts, and so under a jurisdiction to which he is not normally subject, unless certain provisions are satisfied. If he is a necessary or proper party to an action brought against a defendant who is subject to the jurisdiction there is obviously something to be said, on the ground of convenience, for allowing service on him. There would, however, be no sufficient safeguard for the foreigner, if the claim made against the resident defendant were not open to the scrutiny of the court, and if the mere making of a claim were enough. The words " properly brought " are introduced to provide such a safeguard. In construing them, it is permissible and indeed necessary to remember that this is their object. It is easy to state extreme cases in which it is plain that the provision is, or is not, satisfied. On the one hand, no one would say that an action was " properly brought " if it could be shown to be (in the language of R. S. C. Or. 25, r. 4) " frivolous or " vexatious." On the other hand, an action may well be " properly brought " although no one can be sure that the facts which must be established if the action is to succeed will certainly be proved. Between these two extremes there is a considerable field in which the problem is less clear-cut. In the present case the argument proceeded mainly on the assumption that the facts, at any rate so far as they had been elucidated, were not in dispute. It was contended on behalf of the appellants that they had at least reasonable ground for confidence that the law was on their side, and on behalf of the respondents that the court must decide the point of law at this stage, and that on a correct view of the law the decision must be adverse to the appellants' claim.

My Lords, I am anxious to give full weight to the manifest object of a provision which protects the foreigner, but I am unable to construe the phrase " properly brought " as ruling out an action founded on a legal proposition, which though it may not commend itself to the court hearing the application, expresses a possible and reasonable opinion on a point which is one of difficulty, and is open to doubt. I am conscious that I am here making an assumption which, in the submission of the respondents, is wholly illegitimate. The law, they say. is always certain. There are no doubtful points. There is only one right answer to any question. If an action is founded on a wrong view of the law and could succeed only if that view were accepted, then it is not " properly brought." Therefore, in order to decide whether or not an action is " properly "brought," the court must make up its mind about the law, however difficult and doubtful the point involved may seem. In support of his thesis counsel for the respondents emphasized, very rightly, the injustice that would result if a foreigner were joined as a defendant in proceedings in which it ultimately appeared that there was no cause of action against the resident defendants. Regrettable though it may be that a foreigner should ever be haled before our courts, and perhaps suffer judgment, though no action lay against his co-defendants, the fact must be faced that this risk is hardly to be avoided on any view of the rule. Let it be granted that the law is always certain. It must nevertheless be acknowledged that practitioners, and even judges, sometimes have to find the best way they can through an obscure and difficult field of law, illuminated only by conflicting decisions. There may be a period, sometimes a long period, during which the truth, which is in its nature certain, has not been finally revealed to a perplexed world. At such a time it may happen that a judge, compelled to express a definite opinion, will accept, by an excusable error, a plaintiff's incorrect view of the law. The foreigner may not be disposed to welcome the suggestion that he should take the matter further, possibly even as far as your Lordships' House. He may not be anxious to fight the battle of the other defendant, and may think that as a series of appeals might after all prove to be nothing better than a preliminary skirmish, he will be wise to reserve himself, and keep his money, for the main engagement. Should he take this prudent course, it may turn out in the end, after the action has been heard and finally disposed of, that the judge who permitted service upon him was wrong, that there was no case against the resident defendant, and that, therefore, the foreigner ought never to have been joined. But if the foreigner has rightly been held liable, the fact that he was wrongly joined will avail him nothing. He will not get his money back, or be freed from the judgment given against him. If the doubt is about the facts rather than the law, it is admittedly inevitable that after the trial and any appeals which follow it are over, the foreigner may be found to have been brought before the court on a false assumption. For these reasons I am of opinion that those who framed the rule cannot have hoped, or intended, that a foreigner should never be joined as a "necessary or proper party" to an action which was wrongly brought against his English co-defendants in the sense that, on a true view of the law, it could not succeed against them. I think that the dictum of Morton J. (as he then was) in *Ellinger* v. *Guinness, Mahon & Co.* (1), on which the appellants relied, was substantially correct. Further support for this view may be found in the decision in *Massey* v. *Heynes & Co.* (2), where the action was bound to fail against the English defendants if it succeeded against the foreign defendants. In the Court of Appeal Lord Esher M.R. said (3): " To what " period of time does the rule in question apply ? It must " certainly apply to the time of the service of the writ or notice " of the writ. How can the court deal with the case then ? " Not according to the result of the trial of the action ; they " cannot take into account what may be the result of the trial, " or they could never decide who would be a ' proper party ' " to the action until the trial was over."

My Lords, the construction of the rule which commends itself to me, as it has, I think, long commended itself to the courts, is criticized on the ground that the rule, so interpreted, supplies only a vague and uncertain criterion. I think it must be admitted that the rule, as I understand it, does not supply a touchstone so certain that there is no room left for difference of opinion among judges. But this defect, if it be a defect, is, I think, inherent in the words which those who framed the rule have chosen, and it is not for the courts to impose a more rigid test. Moreover, it does not seem to me to be at all surprising that the rule should leave some latitude to the judge. A judge is frequently set the task of deciding whether there was " reasonable and probable " cause " for an action, and I have heard no complaint that the question is too vague to be answered with accuracy. Indeed if the question be asked whether in this country one is likely to find a rigid rule laid down rather than one which has some elasticity, I suppose that few English lawyers would say that rigid rules form a marked feature of our system of law. It may be added that there is something to be said for a construction which avoids the result that a question of law vitally affecting an English defendant is tried and determined in his absence. It is true that if the court decides that there is no case against him he will have no cause to complain. His position will be less happy if, on the assumption that the facts are not in dispute, it is held in his absence that

(1) [1939] 4 All E. R. 16, 22.
(2) 21 Q. B. D. 330.
(3) Ibid. 338.

he can have no answer in law to the claim. It has been suggested that he would be entitled to join in the argument even at this preliminary stage. If that is right, the procedure would be costly and cumbrous, and I find it difficult to believe that the rule contemplates proceedings in which the liability of one defendant is to be determined before the trial begins.

My Lords, I apologize for this lengthy preamble, but it seems to me important that the judges who have to observe the rule should be left in no doubt as to its true effect. For myself, I do not differ from the view expressed by the Court of Appeal (1) that, assuming all the facts to be admitted, an action is not "properly brought" if "on those facts it is "apparent that the plaintiffs cannot succeed against the "defendants joined within the jurisdiction," and I think that they correctly stated the question for decision (2) as being whether "it can be reasonably argued" that those defendants are liable to the plaintiffs. I cannot follow them to the length of accepting without qualification, as in one passage of the judgment they seem to do, the proposition for which the respondents' counsel contended. It cannot be said of every legal problem that the correctness of one of two conflicting views is "apparent," or that the opposing contention is not reasonably arguable. I agree, however, with my noble and learned friend on the woolsack that it would be wrong to say that there was an arguable point of law merely because a series of enactments had to be considered and collated, and also with my noble and learned friend Lord Simonds that difficulty or complexity of subject matter ought not to deter the court from qualifying itself to answer the question: "Is this action bound to fail?"

I now turn to the facts, which have been said by Pilcher J. and the Court of Appeal not to be in dispute. It is at this point that it is essential to remember that it is for the plaintiffs (the appellants in this case) to satisfy the court that the demands of the rule are satisfied, and that, in their own interests, as well as in pursuance of their duty, it is for them to see that all relevant facts known to them are before the court. It cannot be said of the present appellants that they have been generous with their information. Such as it is, it is contained in the affidavit of Mr. Smith, a managing clerk of the appellants' solicitors. He tells us that the appellants are advised, and that he (Mr. Smith) verily believes, that they have a good

(1) [1948] P. 33, 40.

(2) Ibid. 41.

cause of action against all the defendants. He adds that an action has already been begun against the second and third defendants, as owners of part of the cargo of the *Brabo*, and this action, he says, he is advised and verily believes to have been "properly brought" against them. Speaking for myself, I am prepared to accept this evidence, and to regard it as disposing of any charge of bad faith against the appellants. They believe in their case. That is really all that Mr. Smith told the court. Paragraph 7 of his affidavit suggests that he could, if he would, have told a good deal more, for he refers to "documents and information" in the possession of his firm, from which his means of knowledge and information are derived. At this stage it may have been thought unnecessary further to enlighten the court. Later, perhaps, more might have been revealed with advantage. The affidavit of the respondents' solicitor, though irregular in form, since the source of his information is not stated, asserts plainly, first, that the Minister of Supply was dealing with the cargo on behalf of the Crown, secondly, that the third defendants were "merely the agents of the Ministry of Supply." If these words are given their ordinary meaning, the facts which they state seem to me to rule out the possibility of a successful action by the appellants against the second and third defendants, or either of them. As to this, I find myself substantially in agreement with the Court of Appeal. The statutes to which your Lordships were referred do not bind the Crown. The Minister of Supply, acting as the agent of the Crown, cannot be sued successfully under a statute which does not bind the Crown. This is in general equally true of any person who is acting as "a mere agent" of the Crown. Mr. Carpmael submitted, as one branch of his argument, that the facts were not sufficiently ascertained, on the information before the court, to make it possible to say whether the action could succeed against the second and third defendants, and he suggested that, so far as the third defendants were concerned, it was consistent with the evidence that the appellants had dealt with them as principals. But, as I have said, it was for the appellants to satisfy the court that they had a claim against the second and third defendants which brought them within the rule. If they were in a position to prove, or to allege on reasonable grounds, any facts from which it could be argued that the other defendants, although they were agents of the Crown, might still be liable, it was for them to bring to the notice of the court such evidence of those facts as they possessed. The "documents and information" which, as we know from Mr. Smith's affidavit, are in the possession of the appellants' solicitors, would in all probability have furnished the necessary information. On the evidence available I do not think that it can be said that there is secure ground for a belief that the action is "properly brought" against the English defendants. The statements contained in the affidavit sworn on behalf of the respondents remain unchallenged, and I think it a legitimate inference that the appellants are in no position to swear to any facts which would weaken their effect. Even assuming, therefore, that the appellants might succeed against the third defendants if they did not know them to be "mere agents" of the Crown, it would be wrong, in my opinion, to deal with the case on the footing that the appellants had not that knowledge. I have thus reached the conclusion that the Court of Appeal rightly decided that, on a fair reading of the available evidence, it was apparent that the appellants' claim against the second and third defendants could not succeed and that it was therefore not properly brought. It was contended for the appellants that the Crown might (as it was put) waive the defence that it was not bound by the appellants' statutes. I think, with respect, that this is an idle contention. If the Crown is not bound by a statute it cannot owe a debt by reason of the terms of that statute. If there is no debt owing, an action for debt cannot be properly brought. It may be that the reticence of the appellants has left the courts in the dark as to some material fact, and that this action will still proceed against the English defendants. If it does, it is conceivable that those defendants may have evidence to produce which will throw a new light on the case, and even that they may wish to submit that the respondents should be brought in as third parties. In that perhaps not very likely event, the position of the second and third defendants would not be prejudiced, and it would be open to them to apply to the court under R. S. C. Or. 11, r. 8*a*. I say this, not to encourage such proceedings, but to make it clear that the dismissal of this appeal cannot, in my opinion, injuriously affect the rights of parties who were not before the courts or this House.

On the view I take no question arises about the proper exercise of discretion. I would dismiss the appeal.

LORD NORMAND. My Lords, as this appeal raises a question of the English law of procedure, I would have wished merely to express my concurrence in the conclusion which has been arrived at unanimously. But there is a difference of opinion whether leave to serve out of the jurisdiction should have been refused because the action was not "properly brought" (Or. 11, r. 1 (*g*)) or because the granting of leave was not a proper exercise of the judicial discretion, and it therefore becomes necessary that I should state the view which I have formed. The jurisdiction conferred by service out of the jurisdiction is anomalous, and the very words which describe it betray that it is a departure from the jurisdiction recognized by the comity of nations and an invasion of the sovereignty of the state within which leave to serve is granted. The rules laid down by Farwell L.J. in *The Hagen* (1), emphasize the court's duty of caution when it is asked to allow service out of the jurisdiction and the duty of the party applying for leave to make a full and fair disclosure. In *John Russell & Co. Ld.* v. *Cayzer, Irvine & Co. Ld.* (2), Lord Sumner pointed out that "the words 'properly brought' enure to the protection "of the person out of the jurisdiction whom it is proposed "to serve with process. His protection is not to be found "exclusively in the words 'a necessary or proper party'." Their function is therefore to restrain within proper limits a power made mainly for the convenience of English plaintiffs, though it is also advantageous in many cases to the English defendant and in some even to the foreign defendant. The words "properly brought" if narrowly construed would not afford to the foreign defendant the protection to which he is entitled and I think they are wide enough to oblige the court, whether it be the court to which the original application is made, or any court reviewing the order made by that court, to refuse the application when on all the material before it it comes to the conclusion that the action as laid against the English defendant cannot succeed, either because the plaintiff has failed to state a valid ground of action or because on the facts established by admissions or by uncontradicted affidavits the English defendant has a valid defence.

LORD MACDERMOTT. My Lords, while I agree that this appeal should be dismissed I prefer to relate my conclusion to the discretion exercisable under Or. 11, r. 4, rather than to the test which was adopted by the Court of Appeal and which

(1) [1908] P. 189.

(2) [1916] 2 A. C. 298, 304.

H. L. (E.)

1949

TYNE IMPROVEMENT COMMISSIONERS *v.* ARMEMENT ANVERSOIS S/A (THE BRABO).

Lord MacDermott.

appears to mean that an action must be regarded as not "properly brought" within the meaning of r. 1 (*g*) if, upon the relevant facts being admitted, the court decides that in law it cannot succeed.

My Lords, in themselves the words "an action properly "*brought*" do not suggest the ultimate result as a criterion and there is nothing that I can find in their context to indicate the contrary. I think, indeed, that r. 8A (*a*) of Or. 11, rather points the other way, for it makes sub-rule (*g*) applicable to originating summonses, and the nature of proceedings so initiated may well be such as to make it inapt, when the legal issues are determined, to speak of the plaintiff as having either succeeded or failed against particular defendants. It must be borne in mind, of course, that the words under discussion "enure to the protection of the person out of the "jurisdiction whom it is proposed to serve with process," as Lord Sumner put it in *John Russell & Co., Ld.* v. *Cayzer, Irvine & Co., Ld.* (1). That consideration, however, seems to me to fall far short of supporting the view adopted here by the Court of Appeal, and it is to be observed in this connexion that in the case just cited Lord Wrenbury said with reference to the expression in question (2): "My Lords, those words, "to my mind, do not mean founded upon a good cause of "action." I confess that, for my part, I do not see why an action with the object of resolving some vexed question of law should not be "properly brought" irrespective of the decision to be obtained, or why the expression as used in the sub-rule should be given the highly artificial meaning necessary to make a test of success or failure in the suit applicable. Whatever the theory may be, points of law are in practice often highly debatable and hard to settle, as well as being less easily laid to rest than questions of fact, and I find it difficult to construe these particular words as inviting the court, on an interlocutory application made in the earliest stages of the litigation, to embark, in the absence of any factual dispute, on an adjudication as to the ultimate rights of the parties within the jurisdiction. I respectfully agree with the opinion of Morton J. (as he then was) in *Ellinger* v. *Guinness, Mahon & Co.* (3), when he says: "I do not think "it is part of the function of the court, in considering whether "an action is 'properly brought' against a party within

(1) [1916] 2 A. C. 298, 304.

(2) Ibid. 306.

(3) [1939] 4 All E. R. 16, 22.

" the jurisdiction, to arrive at a conclusion as to whether the " plaintiff will or will not succeed against that party. It is " enough if the court is satisfied that there is a real issue " between the plaintiff and that party which the plaintiff " may reasonably ask the court to try." Here, I think, the issue between the plaintiffs and the defendants in the jurisdiction was real in the sense in which I take Morton J. to have used the term. The claim was not made vexatiously or mala fide ; it was of a nature known to the law and arose, undoubtedly, from a genuine dispute as to where liability for the grave loss which had been incurred should rest. I think also that the issue was one which the plaintiffs were reasonable in asking the court to try. It was raised with due regard to the rules of procedure. It was substantial and important. It was, moreover, triable in the sense that the questions of law which emerged invited close argument from both sides and a careful exposition of the relevant enactments. That this process was followed before the frailty of the plaintiffs' case was judicially exposed is more important than the exposure itself as respects the point now under discussion. To my mind Pilcher J. was right on this aspect of the matter and, with him, I would hold that the action was " properly " brought."

But this view does not, in my opinion, mean that the probable outcome of an action is necessarily irrelevant to the question whether leave should be given under sub-r. (*g*). If the facts are settled, or are to be taken as settled, and the applicable law is thought by the court to be so much against the plaintiff that his chances of success are negligible, that may on occasion be ground for saying that the foreigner should not be subjected to process in this jurisdiction, and is at least a matter to be taken into account in exercising the discretion conferred by the order. This is apart from any question of mala fides. It is, of course, well settled that an action brought against a party within the jurisdiction without any hope of success and merely in order to found an application under sub-r. (*g*) is not " properly brought." But from the standpoint of the foreigner the motive in suing those within the jurisdiction may well matter less than the circumstance that the proceedings in which it is sought to involve him have no real weight against those already served. If the proceedings are of that kind there exists an element which can hardly be left out of consideration, however " properly brought " the suit may be.

On this view two questions remain: had the present action any chance of success against one or other of the defendants served in England? And, if not, was the discretion properly exercised?

My Lords, on the first of these questions I agree that all matters of defence or objection to the claim may be regarded as open; and I also agree, for the reasons already stated by your Lordships, that the second defendant, the Minister of Supply, is entitled to the immunity enjoyed by the Crown in respect of the statutes sued upon and which, it is clear, do not bind it. As regards the third defendant, the British Iron & Steel Corporation Ld., I have experienced some difficulty because the affidavit of Mr. E. A. Fenwick gives little information as to the nature of this defendant's agency and I do not think it can be said with safety that any agent of the Crown is, irrespective of the terms of the agency, entitled to rely upon this immunity. On consideration, however, I feel that the affidavit which, though vague and unsatisfactory in some respects, has not been challenged, makes it impossible to distinguish between the position of the second and third defendants—at least for the purposes of the present application. I accordingly reach the conclusion that in law, and assuming the defence of immunity to be taken, the plaintiffs would not succeed against either of these defendants. As it is, on the view I have taken, unnecessary to decide whether the statutory definitions of "owner" include the consignees, I express no opinion on the point.

On the question of discretion I do not read the careful judgment of Pilcher J., as indicating that he took into account the weak character of the suit as against the English defendants in relation to the exercise of his discretion. For that reason I think the learned judge's conclusion on this branch of the case may properly be regarded as open to review. On all the facts and circumstances, including the exceptional nature of the claim and its futility as against the second and third defendants, I do not think the first defendants should be brought to court in this jurisdiction. I would, therefore, dismiss the appeal.

Appeal dismissed.

Solicitors for appellants: *Bentleys, Stokes & Lowless for Bramwill, Clayton & Clayton, Newcastle-upon-Tyne.*

Solicitors for respondents: *Holman, Fenwick & Willan.*

[HOUSE OF LORDS.]

H. L. (Sc.)*

1948

Nov. 30; Dec. 1, 2.

1949

Jan. 20.

INLAND REVENUE COMMISSIONERS . APPELLANTS;

AND

REID'S TRUSTEES . . . . . RESPONDENTS.

Revenue—Income tax—Capital and income—Foreign company—Remittance to shareholder in United Kingdom—Dividend payable from capital profits—Whether income in recipient's hands—Income Tax Act, 1918 (8 & 9 *Geo.* 5 *c.* 40), *sch. D, Case V.*

A South African company, in addition to a dividend payable from trading profits, declared a dividend of 20 per cent. "payable "from capital profits realized on the sale of properties," viz., warehouses and office premises occupied by it in connexion with its business of mine furnishing. Shareholders in the United Kingdom had a sum remitted to them there in respect of this dividend, the remittance being received without deduction of income tax.

Held, that the sum so received fell within the charging rules of sch. D of the Income Tax Act, 1918, so as to be assessable under Case V. of sch. D as "income arising from possessions out of the "United Kingdom," the shares, which remained intact, being "possessions out of the United Kingdom" and the sum in question "income arising from" those shares.

Decision of the First Division of the Court of Session 1947 S. C. 700, reversed..

APPEAL from the First Division of the Court of Session, as the Court of Exchequer in Scotland.

The facts, summarized from their Lordships' opinions, were as follows: The respondents were the trustees appointed to act under the trust disposition and settlement of Joseph Reid, deceased, an iron merchant, of Glasgow, who died in 1939. The sum of 6,866*l.* was received by them on December 14, 1943, from Reid Brothers (South Africa) Ld. (hereinafter called "the company"), a company incorporated and registered in the Union of South Africa, in which the trustees held 3,433 shares of 10*l.* each, fully paid. The remittance was received without deduction of income tax by the hands of James M. Reid, as paying agent in the United Kingdom for the company. The Commissioners for the Special Purposes of the Income Tax Acts found in para. 3 of the case stated:

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* *Present:* LORD SIMONDS, LORD NORMAND, LORD MORTON OF HENRYTON, LORD MACDERMOTT and LORD REID.

"The said sum of 6,866*l.* is part of a distribution made by the "directors of the company among the shareholders at the rate "of 2*l.* per share out of profits realized from the sale of capital "assets, to wit, four properties in Johannesburg which "belonged to the company, and were occupied by it as warehouse and office premises." From the memorandum and articles of association it appeared that the company was incorporated in 1918 in the Transvaal under the Companies Act, 1909 (Act No. 31 of 1909). The objects for which it was established were (inter alia): "(*a*) To purchase and . . . . "carry on the business of Reid Brothers (Johannesburg) Ld., "incorporated under the Companies (Consolidation) Act of "1908, and having its registered office in Scotland . . . . "(*b*) To carry on in South Africa, or elsewhere, all or any "of the businesses of iron and steel merchants . . . . wholesale "and retail dealers of and in . . . . all apparatus and things "required for . . . . mines and collieries . . . ." The business which was chiefly carried on was that of mine furnishers. The company was not authorized under its memorandum of association to trade in the buying and selling of property in land. In March, 1943, it owned (inter alia) four stands in Johannesburg, the word "stand" meaning a plot or parcel of land for building and commonly used to include the buildings as well as the site. These were then sold on conditions which entitled the company to continue in occupation of them as warehouse and office premises until permission was granted by the authorities for erection of new business premises elsewhere. When the properties were sold the estimated amount of profit on the sale, viz., 17,451*l.* 19*s.* 10*d.* was transferred to profit and loss account from which it was transferred to a property suspense account. In the opinion of the directors the value of the properties still held was in excess of the balance shewn in the property account. From the sum of 17,451*l.* 19*s.* 10*d.* a dividend amounting to 15,604*l.*, representing a 20 per cent. dividend was declared on October 23, 1943. The company had not been assessed to income tax in respect of this profit. The minute of the directors stated that "it was resolved that a "dividend of 20 per cent. be declared payable from capital "profits realized on the sale of properties during the past "financial year." The minute also stated that "it was "further resolved that the board recommend that a dividend "of 15 per cent. payable from the company's trading profits "for the year ended June 30, 1943, be declared." This dividend was declared accordingly at the annual general meeting of shareholders on December 14, 1943. This dividend, so far as paid to shareholders in the United Kingdom, including the respondents, was paid under deduction of United Kingdom income tax, which was accounted for by the paying agent. The 3,433 shares of the respondents were held by them as follows: 858 shares were appointed to the account of each of the three daughters of James Reid and the remaining 859 shares to the account of his son, Arthur Reid. In the case of the daughters the shares were held for their respective liferents, the fee being payable to their lawful heirs, and in the case of the son the respondents were exercising the discretionary power given to them by the trust disposition. The dividend of *2l.* a share was treated by the respondents in their account of charge and discharge as revenue of the daughters. An assessment to income tax made on the respondents in the sum of 6,866*l.* for the year 1943-4 under sch. D., case V., of the Income Tax Act, 1918, was discharged by the Commissioners for the Special Purposes of the Income Tax Act. A case was stated under s. 149 of the Act of 1918 on the requisition of the appellants, the Inland Revenue Commissioners, who were aggrieved by this determination. By para. VI. the question of law for the opinion of the court was "whether the dividend of 6,866*l.* paid as aforesaid falls "within the charging rules of sch. D. of the Income Tax Act, "1918, so as to be assessable under case V. of sch. D." The First Division of the Court of Session, as the Court of Exchequer in Scotland, answered the question in the negative. Against their interlocutor the appellants appealed to the House of Lords.

Johnston S.-G. for Scotland, Donovan K.C., J. H. Stamp and *Reginald Hills* (all of the English Bar) and *Shewan* (of the Scottish Bar) for the appellants. The Crown's case rests on two submissions: (*a*) So long as the shares, the corpus of the trust estate, remain intact, any remittance received by way of dividend in this country is taxable as income arising out of possessions out of the United Kingdom. (*b*) A liferenter is entitled and only entitled to income of the trust estate and therefore anything received by him or earmarked for him is necessarily income, though, of course, the converse does not apply. The ground of the decision appealed against is that the sum paid to the respondents "is not the income of anyone, and never was": per Lord President Cooper (1). The grounds of the decision of the Commissioners are twofold: (*a*) An analogy, it was assumed, can be drawn between the respondent's liability to tax and that which would have existed had this been a case of a British company and that since, in the latter case, no income tax would have been exigible in respect of the sum in question either in the hands of the company or of its shareholders, it is not taxable now, but the fact that the fund used by the foreign company to make the payment was composed of receipts which would not have been receipts of income in the hands of the company for the purposes of United Kingdom income tax does not affect the quality of the dividend for the purposes of income tax in the hands of the shareholder under case V. of sch. D., which is the statutory provision governing the relationship of the company and the respondents, and there is no analogy in the income tax code between a dividend paid by a non-resident foreign company and one paid by a company registered and resident in the United Kingdom. A foreign company pays no United Kingdom income tax in respect of the fund out of which the dividend is paid and if the shareholder receiving the dividend escaped tax in respect of the sum received by him, then that receipt would have borne no tax at all. This is doubtless the reason that provisions as to liability for income tax are different in the case of a foreign and of a United Kingdom company and that United Kingdom residents are made chargeable directly to tax in respect of their income arising from foreign possessions. (*b*) It was assumed that the corpus of the trust estate in this case is not the shares held by the respondents but the capital assets of the company, diminished to the extent of this dividend, so that the payment takes its character from its source and therefore is a capital and not an income payment; but that also is erroneous, for the assets held by the respondents, and the only ones to which regard can be had, are the shares and not the company's assets. The source of the dividend was the shares and they remained intact after payment of the dividend. The true basis of assessment originates in the Income Tax Act, 1842, s. 100, sch. D., case V. That basis is in principle maintained in the Act of 1918. The tax imposed has no reference to the liability of the company, if it be a com-

(1) 1947 S. C. 700, 707.

pany, paying the remittance. The assets held by the respondents are not the capital assets of the company which are quite distinct from those. If a sum of money is received in this country by trustees because of their ownership of shares in a foreign company that sum is income unless it be received in a winding up of the company. A dividend paid in cash, by a foreign company is "income arising from possessions "out of the United Kingdom," within case V. of sch. D. This sum arises out of the possession of the shares by the respondents. Neither they nor the Revenue are concerned to look beyond the fact that they have received a dividend. If they receive a dividend, then, so long as the company is a going concern, that is revenue which must be treated as taxable income. The Revenue are not bound and, moreover, have no machinery to look at the source of the dividend. It is sufficient if they ascertain that the dividend has been paid by a company in being and does not result from a winding up or liquidation. The true position is expressed by Lord Phillimore in *Bradbury* v. *English Sewing Cotton Co. Ld.* (1), which shows the distinction between the taxation provisions in the case of a United Kingdom company and in the case of persons with foreign possessions. The cases of *Neumann* v. *Inland Revenue Commissioners* (2) and *Cull* v. *Inland Revenue Commissioners* (3) show the position of a British company and its shareholders in relation to income tax. As regards foreign companies or possessions the position is different because the Revenue has no relation with them and depends on its relation with the recipient in this country and the sum which he receives. *Barnes* v. *Hely Hutchison* (4) was a case not dissimilar to the present and *Canadian Eagle Oil Co. Ld.* v. *The King* (5) was an extension of it: see also *Scottish Provident Institution* v. *Allan* (6). So long as the shares remain intact any sum paid to the shareholders is necessarily income, for the capital held by the respondents is intact, their fixed assets being the shares; the sum in question is paid by way of dividend and the dividend is paid out of profits. This sum could only have been treated as income: see *In re Bates* (7) and *Hill* v. *Permanent Trustee Co. of New South Wales Ld.* (8). The respondents in their accounts treated

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(1) [1923] A. C. 744, 769–70.
(2) [1934] A. C. 215, 222.
(3) [1940] A. C. 51, 56.
(4) [1940] A. C. 81, 86.
(5) [1946] A. C. 119.
(6) (1903) 5 F. (H. L.) 10; 4 Tax Cas. 591.
(7) [1928] Ch. 682.
(8) [1930] A. C. 720, 733.

H. L. (Sc.)
1948
Inland Revenue Commissioners v. Reid's Trustees.

this as income and in doing so they were acting in accordance with the latter case. If an individual or a company receives capital profits that is not part of the taxable income of either of them, but when a company distributes capital profits to its shareholders as dividends that is taxable income in their hands. [They referred to *Bouch* v. *Sproule* (1) and *Inland Revenue Commissioners* v. *Blott* (2).] What in practice happens is that in the case of foreign securities, the Revenue treat any receipt as a dividend but if it is shown that it is in truth a realization of capital they treat it as such. It is not contended that every remittance from abroad must be an "income" remittance, but, on the assumption that the dividend in question was paid out of a fund which was, vis-à-vis the company, of a capital nature, it does not follow that the dividend received by the respondents was not, vis-à-vis the recipients, "income arising from possessions out of the United Kingdom." There was no material on which the Commissioners could properly find that it was capital in the hands of the respondents. It did not, from any speciality in its nature, escape from case V. of sch. D. It must be either capital or income and there is no third alternative. A dividend has been distributed while leaving the capital intact and so it cannot be capital. The shares are "possessions out of the United Kingdom" and the dividend is "income arising from them." No capital has been returned to the respondents. To sum up: (*a*) There is no parallel or analogy between the position of a company in the United Kingdom and a foreign company. In ascertaining the liability of a shareholder in a foreign company one must look at case V. of sch. D. above. (*b*) It having been ascertained that the foreign possessions are intact and a sum has been paid in respect of their ownership, that sum is necessarily income and subject to tax. (*c*) All remittances from abroad are taxable unless they result from realization of the foreign possessions. (*d*) The question whether or not this is income can be tested by looking at the ultimate destination of the dividends.

Donovan K.C. following. This dividend was income in the hands of the respondents and was "income arising from "possessions out of the United Kingdom" and so was within case V. of sch. D. It is not taken out of charge because the company itself was not liable to tax on the profit distributed;

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(1) (1887) 12 App. Cas. 385.

(2) [1921] 2 A. C. 171, 182, 197, 201.

that is an irrelevant consideration. This is not a return to the shareholders of part of their capital. In cases between the life tenant and the remainderman, it has been decided that this kind of payment is income: see *In re Doughty* (1). The same principle applies here. This sum has been treated by the respondents as revenue because it is income. [He also referred to *Kneen* v. *Martin* (2); *Williamson* v. *Ough* (3); and *Barnes* v. *Hely Hutchison* (4).]

Tucker K.C. (of the English Bar) and *C. J. D. Shaw* (of the Scottish Bar) for the respondents. On the facts found by the special commissioners the sum in question was not part of the annual profits or gains of the respondents and was not assessable to tax under sch. D. The respondents are only liable under case V. of sch. D. if the Crown brings the sum in question within the charging provisions. It is not the case that the moment a sum of money is received in this country it is prima facie income. It is on appeal at the stage dealt with by s. 137, sub-s. 4, of the Income Tax Act, 1918, that the burden is put on the taxpayer to establish that the assessment is wrong. Confining oneself to the words of sch. D., para. 1 (*a*)(i), the question is whether these are "profits or gains arising "or accruing" to the respondents from property elsewhere than in the United Kingdom. An accretion of capital is, in a sense, a profit or a gain but there is always the question whether it is such a profit or gain as to fall within those words. In the case of a company within the United Kingdom, it has always been accepted that if it sells part of its assets and a surplus arises which is distributed in cash, it is not liable to tax as a profit or gain arising to the shareholders from shares in the United Kingdom and the recipients are not liable to any form of tax. There cannot be a charge to income tax on any dividend paid out of such a capital profit. Income tax is a tax upon income only. Not all profits are taxable. Though this dividend may be of the nature of income, it is not taxable income. As regards a British company a dividend, which is merely the proceeds of the division of a fund, may be either an income dividend or a capital dividend, according to the nature of the fund out of which it is divided: see *Inland Revenue Commissioners* v. *Blott* (5) and *Neumann* v.

(1) [1947] Ch. 263.
(2) [1935] 1 K. B. 499.
(3) [1936] A. C. 384.
(4) [1939] 1 K. B. 93, 99, 105; [1940] A. C. 81, 89, 99.
(5) [1921] 2 A. C. 171, 181–2.

Inland Revenue Commissioners (1). The respondents do not attack *In re Bates* (2) and *Hill* v. *Permanent Trustee Company of New South Wales Ld.* (3), because it is not necessary to do so but, if it were necessary, it would be submitted that both decisions are wrong. In the case of *In re Bates* (4), Eve J., though he held the destination of tax-free capital dividend to be the life tenants, also held that the assets in question remained an uncapitalized surplus derived, not from trading, but from a fortunate appreciation in value of some of the company's capital assets and that, in the hands of those who received it, the dividend retained the same characteristics. This case was approved in *Hill* v. *Permanent Trustee Company of New South Wales Ld.* (3). See also *In re Doughty* (5) in which there was no doubt that the sums held payable to the tenant for life were not chargeable to tax, and where it was said by Somervell L.J. that when capital profits are distributed by a company during the life of the tenant for life, they fall within the word " income " although they are not subject to income tax in the hands of the recipient. *Jones* v. *Leeming* (6), indicates that there is really no such thing as a capital profit. When one asset is changed into another, then, unless that operation is your trade, you have no profit. When one speaks of a " profit " in such circumstances one means that, expressed in terms of money, the asset you now have is worth more than what it cost you to acquire the first asset. There is really no profit; the capital has merely changed its form. It is misleading to talk as though a company had two possibilities—to make trading profits and to make capital profits. This is not so. Since, if this had been a United Kingdom company carrying on business here and the same events had occurred, no income tax would have been payable in respect of this receipt, either by the company or its shareholders, it would be an anomaly to hold that the law is otherwise in the case of a foreign company. There is an analogy between a United Kingdom company and a foreign company and there is no essential difference when it is the latter that makes a " capital profit." Accordingly no greater liability should be imposed on the recipient. The appellants do not dispute that if a foreign company were wound up,

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(1) [1934] A. C. 215 222, 225, 230, 233, 236.
(2) [1928] Ch. 682.
(3) [1930] A. C. 720.
(4) [1928] Ch. 682, 687–8.
(5) [1947] Ch. 263, 273.
(6) [1930] A. C. 415.

H. L. (Sc.)

1948

Inland Revenue Commissioners v. Reid's Trustees.

no part of the assets coming to a shareholder on a distribution would be income; what a company distributes on a winding-up is capital. The position is the same here. The respondents concede that in case V. "possessions" refers to the shares held by them. Foreign companies differ in this respect from United Kingdom companies that whereas, on the profits of a United Kingdom company, tax is paid by the company under case I. and recovered by the company from its shareholders under r. 20 of the General Rules, a foreign company pays no United Kingdom tax on its profits, which are charged under case V. when they reach the British shareholder in the form of dividends. But, for the present purpose, they are in pari casu. For the purposes of taxation the law disregards the distinct personality of the company and treats its taxation as that of the shareholders. A profit taxed in the hands of a United Kingdom company is not taxed in the hands of the shareholders and there is no reason why a profit which would not be taxed in the hands of a United Kingdom company should be taxed in the hands of the shareholders merely because the company is foreign. [They referred to *Cull* v. *Inland Revenue Commissioners* (1); *Neumann* v. *Inland Revenue Commissioners* (2); *Canadian Eagle Oil Co. Ld.* v. *The King* (3); the Income Tax Act, 1842, s. 40; the Income Tax Act, 1918; r. 1 of the General Rules; the Finance Act, 1927, s. 38, sub-ss. 1, 2; s. 39, sub-s. 1.] As to the case of partnerships, see the Income Tax Act, 1918, s. 20 and r. 10 of the Rules applicable to cases I. and II. of sch. D.

C. J. D. Shaw following. In the case of a United Kingdom company dividends are not directly assessed in the hands of the shareholders: see *Bradbury* v. *English Sewing Cotton Co. Ld.* (4). But they are so assessed in the case of a foreign company: see the Rules applicable to case V. of sch. D. In the case of dividends paid out of a capital appreciation these are not, when paid by a United Kingdom company assessable in the hands of the shareholders, though not for the same reasons as in *Bradbury's* case (4). There is no reason for different treatment in the case of a foreign company. The question is basically whether or not the payment was made out of profits or gains.

Johnston S.-G. for Scotland in reply. The real question is whether, in deciding whether this sum is income, weight should be given to the consideration that a profit on a sale of land would not, in the hands of an English company, have been subject to tax or whether the dividend should be treated as income from foreign possessions (viz., shares) still in the hands of the trustees. From *Bradbury* v. *English Sewing Cotton Co. Ld.* (1) to *Canadian Eagle Oil Co. Ld.* v. *The King* (2), no such analogy has been drawn as that for which the respondents contend. The annual profits or gains here are the dividends and the possessions are the shares. The source of the sum is not capital. It is the shares which give a right to the dividend. Even if the sum used to pay the dividend be capital in the hands of the company, it is income in the hands of the recipient shareholder. It is to that one must look, for the tax gatherer always looks to the recipient's hands. It does not matter to the Revenue where the sum comes from. What matters is its character in the hands of the recipient. In dealing with this problem no regard should be had to the position of a British company. The only question is whether these are annual profits or gains arising from possessions out of the United Kingdom. The only relevant provisions are those of sch. D. It is admitted that if the money arising from the sale of land had been paid by way of reduction of share capital that would not have been income and that if bonus shares or bonus debentures had been created there would have been no receipt of income, since new capital assets would have been created. [He referred to *Neumann* v. *Inland Revenue Commissioners* (3); *Barnes* v. *Hely Hutchison* (4); and r. 7 of the Miscellaneous Rules Applicable to sch. D.] In this case the Crown is prepared to pay the costs of the appeal in any event.

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(1) [1940] A. C. 51, 56, 74, 75, 77.

(2) [1934] A. C. 215, 235.

(3) [1946] A. C. 119, 133, 141.

(4) [1923] A. C. 744.

The House took time for consideration.

Jan. 20, 1949. LORD SIMONDS. My Lords, I do not understand it to be denied by the Crown, that the dividend of 20 per cent. was in fact paid out of what are conveniently called "capital profits," that is to say, profits which were derived from a sale of capital assets at an enhanced value, and would not, if the company were being assessed to tax under case I. of sch. D be included in the computation of its trading profits.

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(1) [1923] A. C. 744.
(2) [1946] A. C. 119.
(3) [1934] A. C. 215, 235.
(4) [1939] 1 K. B. 93, 99, 105; [1940] A. C. 81, 89, 99.

It is in these circumstances that the question arises whether the Court of Session, affirming the special commissioners, has rightly held that tax is not exigible.

The claim of the appellants is founded on case V. of sch. D. They say that this sum of 6,866*l.* is "income arising from "possessions out of the United Kingdom," that the shares in a South African company are possessions out of the United Kingdom and that the sum in question is income arising from those shares. They say that there is no tertium quid. This sum is either capital or income. How can it be capital, if the shares remain intact, so many shares of 10*l.* each in the capital of the company? There is a way of distributing a dividend, while leaving the capital intact, and there is a way of returning part of the capital: it is the former course that has here been taken. This then, they say, is income. When Lord Macnaghten in *London County Council* v. *Attorney-General* (1) reminded this House, in an oft-quoted phrase, that income tax is a tax on income, he did not mean that that only was income which fell within case I. of sch. D., but he intended a wider and more popular test, a test which is here satisfied by the fact that the sum has been without question treated not as capital but as income of the trust and that this treatment has legal sanction in relevant decisions of high authority, see, e.g., *Hill* v. *Permanent Trustee Company of New South Wales Ld.* (2); *In re Bates* (3); *In re Doughty* (4); *Forgie's Trustees* v. *Forgie* (5).

My Lords, this is the short and simple case made by the appellants and I see no answer to it. The learned Lord President accepted an answer which he thus stated (6): "The "short answer of the respondents, accepted by the special "commissioners after investigating the facts, is that this "sum is not the income of anyone, and never was. I agree." My Lords, I must say with great respect that I think that this conclusion can only be reached by ignoring that what may be regarded as capital in the hands of the payer may yet be income in the hands of the payee. It is begging the question to say that this sum is not income in the hands of the shareholders: by every practical test it has proved to be income. I will assume that the money out of which the dividend was paid was capital in the hands of the company for the purpose,

(1) [1901] A. C. 26, 35.
(2) [1930] A. C. 720.
(3) [1928] Ch. 682.
(4) [1947] Ch. 263.
(5) 1941 S. C. 188.
(6) 1947 S. C. 700, 707.

at any rate, of ascertaining its taxable profit. I think that the commissioners were entitled to find that as a fact; but it was not the fact, and they were not entitled to find as a fact, that the dividend in the hands of a recipient shareholder was not his income.

But, it was urged, this will create a strange anomaly. If this was an English company, carrying on its trade in the United Kingdom, and the same series of events occurred, an appreciation of capital assets, a realization of those assets and a distribution by way of dividend of so called capital profits, no income tax would be exigible in respect of them in the hands of the company or of its shareholders. My Lords, let it be so. I think it should not be necessary to repeat what has so often been said in this House that the position of a company resident in the United Kingdom (I will call it an English company) and its shareholders is wholly different from that of a foreign company and its shareholders, who, being resident here, are taxable in respect of income from their foreign possessions. The most striking difference, which itself cuts at the root of any argument based upon a disparity of treatment, is that a shareholder in an English company is not, but a shareholder in a foreign company is, directly assessable to tax in respect of the dividends that he receives. The consequences that flow from this are far-reaching. They led at one time to what was known as the rule in *Gilbertson* v. *Fergusson* (1) now happily laid at rest. They still produce this anomaly, that, while a shareholder in an English company is not assessable to tax because the company (though not his agent) has " notionally " paid it for him or because his dividend has been " franked " by payment by the company (both expressions are used), yet the shareholder in a foreign company must pay tax upon the whole of his dividend under case V., whether or not that dividend has been paid out of profits which themselves had already borne tax in the hands of the company: see *Canadian Eagle Oil Co. Ld.* v. *The King* (2). So, too—and it is really another facet of the same proposition—while under r. 20 of the General Rules applicable to schs. A., B., C., D., and E., an English company may, if it thinks fit, deduct tax from the dividend that it pays, that rule has no application to the case of a foreign company whether or not it has in fact paid tax on some part of the profits out of which the dividend is paid. It is not, I think, going too far to say

(1) (1881) 7 Q. B. D. 562. (2) [1946] A. C. 119.

that for the determination of the question, whether under case V. the dividend payable upon the shares of a foreign company is taxable income, it is irrelevant and, more than that, misleading to look to the analogy of an English company. And here too I would remind your Lordships of the observation of Lord Phillimore in *Bradbury* v. *English Sewing Cotton Co. Ld.* (1), that, in regard to the income arising from foreign possessions, "the officers of the Crown do not know and do "not care what is the character of the sources from which "the money comes." I must not be taken as suggesting any inaccuracy or insufficiency in the information which has in this case been furnished by the South African company, but it is obvious that as a general rule the Inland Revenue authorities cannot have the same facilities for investigating the affairs of a foreign company and checking its statement that a dividend is paid out of "capital profits." They must work upon a broader basis and I cannot imagine a safer or better one, where the question is as to income arising from a foreign possession, than to ask whether the corpus of the asset remains intact in the hands of the taxpayer. That question can in the case of the shares here in question only be answered in the affirmative. The shares the respondents held before the distribution of dividend they still hold intact. The dividend they received was income arising out of those shares. I therefore move that this appeal be allowed and the interlocutor of the Court of Session reversed in so far as it affirmed the determination of the special commissioners and answered in the negative the question of law raised by the case. So far as it related to expenses, the interlocutor will remain undisturbed and by an arrangement properly made by the appellants they will pay the costs of the respondents of the appeal to this House, such costs to be taxed as between party and party.

LORD NORMAND. My Lords, the argument for the Crown, was based on the words of sch. D., case V., and sought no aid from other provisions of the Income Tax Act, 1918. There are two parts of sch. D. to be considered: the first is the charging section which provides that tax under the schedule shall be charged in respect of (*a*) the annual profits or gains arising or accruing (i) to any person in the United Kingdom from any kind of property whatever, whether situated in the

(1) [1923] A. C. 744, 770.

United Kingdom or elsewhere. The rest of the section is not material. The second section deals with the several cases under which the tax shall be charged. The tax under case V. is "Tax in respect of income arising from possessions out "of the United Kingdom." It is therefore necessary before tax can be charged under sch. D., case V., to show that there is a profit in the nature of income arising from possessions out of the United Kingdom.

The Special Commissioners and the First Division agreed in holding that the dividend in this case is not income. The Special Commissioners' finding is that it is of the same capital nature as the source from which it was paid. The Lord President, delivering the judgment of the First Division, held that it was not the income of anyone and never was. He said (1): "No doubt the respondents still hold the same "3,433 shares as they held before this distribution; but "part of the fixed assets in which the company's capital had "been sunk has disappeared as a result of the sale, and—to "the extent of *2l.* in each share—the respondents have in "substance received in cash a return of part of their capital." I respectfully think that in this passage there may lurk some ambiguity about what are the possessions out of the United Kingdom from which the dividend arises, but it seems to me beyond dispute that "the possessions" are the shares and that it is incorrect, both in law and in substance, though I would prefer to draw no such distinction, to treat the shareholder as possessing the capital assets of the company. The Lord President also attached importance to the diminution in the value of the company's assets, and therefore of the shares in a winding up, caused by the withdrawal of the sum required to pay the dividend. But, with respect, the same result must follow the withdrawal of money in order to pay a dividend the source of which is ordinary trading profits.

There are, in my opinion, valid reasons for treating the dividend as taxable income in the respondents' hands. The payment was quite properly described as a dividend, and a dividend is at least prima facie income of the recipient. In law capital cannot be returned to shareholders by a mere money distribution whether called a dividend or by some other name and there was in this instance no return of capital. The shares of the company remained after the distribution intact and precisely as they were before it. The payment

(1) 1947 S. C. 700, 707.

wears on the face of it, therefore, the appearance of an income receipt in the hands of the shareholders. It is not irrelevant to consider how similar dividends have been dealt with in a question between liferenter and fiar or tenant for life and remainderman. It has been held that according to the law of England a payment received by way of dividend out of the proceeds of a sale of the company's assets prima facie goes to the tenant for life as income of the trust estate. In *In re Bates* (1), the sum distributed represented profits on the sale of steam trawlers previously owned and operated by the company. Eve J. held (2) that "it was a fund which "the company could treat as available for dividend and could "distribute as profits, or having regard to its power to increase "capital could apply to that purpose by, for example, "increasing the capital, declaring a bonus and at the same time "allotting to each shareholder shares in the capital of the "company paid up to an amount equivalent to his proportion "of the bonus so declared. Unless and until the fund was "in fact capitalized it retained its characteristics of a "distributable profit." In *Hill* v. *Permanent Trustee Company of New South Wales Ld.* (3), Lord Russell of Killowen, delivering the opinion of the Privy Council, expounded the law in a series of propositions of which it is enough here to cite the following: "(2.) A limited company not in liquidation can make no "payment by way of return of capital to its shareholders "except as a step in an authorized reduction of capital. Any "other payment made by it by means of which it parts with "moneys to its shareholders must and can only be made by "way of dividing profits. Whether the payment is called "'dividend' or 'bonus' or any other name, it still must "remain a payment on division of profits. (3.) Moneys so "paid to a shareholder will (if he be a trustee) prima facie "belong to the person beneficially entitled to the income "of the trust estate. If such moneys or any part thereof "are to be treated as part of the corpus of the trust estate "there must be some provision in the trust deed which brings "about that result. No statement by the company or its "officers that moneys which are being paid away to share-"holders out of profits are capital, or are to be treated as "capital, can have any effect upon the rights of the beneficiaries "under a trust instrument which comprises shares in the

(1) [1928] Ch. 682.
(2) Ibid. 687–8.
(3) [1930] A. C. 720, 731.

"company." These two cases were followed in the later case of *In re Doughty* (1). These cases do not turn on any principle which is not common to the law of England and the law of Scotland (*Forgie's Trustees* v. *Forgie* (2)), and they are, I think, entirely congruous with the principle applied by Lord President Kinross in *Ross's Trustees* v. *Nicoll* (3). The question there was whether the duplicands of feu-duty payable to trustees who held the superiority of certain lands together with the several feu-duties and casualties payable to the superior fell to be paid to the liferentrix entitled to the free income of the estate. The Lord President said (4): "The question asked "is whether these duplicands of feu-duty form part of the "income of the trust-estate and I am of opinion that they do. "They do not come out of capital, and they leave the capital "of the estate untouched." This is no more than an application of the Civil Law conception of ususfructus as a "jus alienis "rebus utendi fruendi salva rerum substantia" which still plays its part in our law of liferent and fee. Your Lordships are not in this appeal concerned to construe the terms of the trust deed, and I therefore express no opinion whether the dividend under consideration was, under the particular terms of that deed, properly treated as the revenue of the liferentrices, but these authorities show that a distribution of money to shareholders out of profits realized by the sale of the company's assets without any alteration of the share capital is normally a payment of the nature of income.

But then the respondents say that though the dividend may be of the nature of income it is not taxable income. They say justly that a profit derived from the sale of a capital asset would neither have been taxed in the hands of the company if it had been registered in the United Kingdom, nor have been taxed by deduction when the dividend was paid. The company would not have been taxed on this profit for it would not have been reckoned part of the profits and gains of the company's business under the rules by which the profits and gains of the company would have been computed, if it had been a British company. The shareholder would not have suffered any deduction because the dividend was not paid out of profits and gains brought into charge. The argument for the respondents then attempted an elaborate analogy between the taxation of the British

(1) [1947] Ch. 263.
(2) 1941 S. C. 188.
(3) (1902) 5 F. 146.
(4) Ibid. 148.

company and its shareholders and the taxation of a foreign company and its shareholders. It assumed an overriding principle of taxation consistently applied both to British and to foreign companies and their respective members. The Income Tax Act is an unpromising field for the argument from analogy and it has been said in authoritative expositions of the law in this House that there is no analogy between the provisions for taxing the profits of British companies and the provisions for taxing the profits of foreign companies, and no overriding principle common to both.

In *Cull* v. *Inland Revenue Commissioners* (1), Lord Atkin states the law applicable to British companies thus: " It is " now clearly established that in the case of a limited company " the company itself is chargeable to tax on its profits, and " that it pays tax in discharge of its own liability and not as " agents for its shareholders. The latter are not chargeable " with income tax on dividends, and they are not assessed " in respect of them." The position of the British company and its shareholders in relation to income tax is special (*Neumann* v. *Inland Revenue Commissioners* (2) per Lord Tomlin), and hinges on the deduction at the current standard rate of income tax from dividends before payment, now authorized by r. 20 of the General Rules, a rule which does not apply to foreign companies (*Canadian Eagle Oil Co. Ld.* v. *The King* (3) per Viscount Simon L.C. and Lord Thankerton). " So far as income tax at the standard rate is concerned, " dividends received by the shareholders of a [sc: British] " company are regarded as franked by the payment by the " company of income tax on its profits or gains " (*Cull* v. *Inland Revenue Commissioners* (4) per Lord Macmillan). The position of foreign companies and their shareholders resident in the United Kingdom is entirely different. The foreign company is beyond the jurisdiction and is not assessable and cannot be taxed; the British shareholder is directly assessable and is taxed on the full amount of the dividend received by him (r. 1. of the rules applicable to case V.). In *Canadian Eagle Oil Co. Ld.* v. *The King* (5), the Lord Chancellor said: " The provision of the Income Tax Act, 1918, by which " deduction at the source is authorized in the case of dividends " in respect of shares in companies resident in the United

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(1) [1940] A. C. 51, 56.
(2) [1934] A. C. 215, 222–3.
(3) [1946] A. C. 119, 134, 141.
(4) [1940] A. C. 51, 64.
(5) [1946] A. C. 119, 133.

" Kingdom, stands in sharp contrast to the rules which relate " to dividends of foreign companies." Lord Macmillan in the same case pointed out (1) that there was a " fundamental " distinction drawn in the income tax code between income " arising from sources in this country and income arising " from sources outside the United Kingdom," and observed that (2): " The topic [viz. the position of a foreign company " and of its shareholders] has been darkened rather than " illuminated by a false analogy which it has been sought " to draw with the case of the taxation of the income of United " Kingdom companies and their shareholders." Lord Simonds said (3): " The shareholder in an English company is not " taxed upon his dividend, but he goes untaxed because " on the true construction of the Income Tax Act no tax is " imposed on his dividend. He does not escape tax because " some overriding principle says that he shall not be " taxed. . . . . But in the case of the foreign company's " dividend the Act imposes tax in unambiguous terms. It " is impossible to escape it by reference to some overriding " principle." In *Barnes* v. *Hely Hutchison* (4), a case dealing with the liability to tax of a British shareholder in a foreign company, Lord Wright said: " I do not think for several " reasons that the analogy of dividends of an English company " applies, and I see no sufficient ground in a case like the present " for relieving the respondent from what is expressed to be " his liability under case V." These citations may suffice, though it would be easy to add to their number, to show that the argument from analogy has no validity.

The liability to tax of a British shareholder of a foreign company depends, therefore, on the proper construction of sch. D., case V., which is not affected by the provisions for exemptions or abatements, or for the assessment of surtax. For the reasons which I have already given my conclusion is that the respondents are liable under sch. D., case V., and I would allow the appeal.

LORD MORTON OF HENRYTON. My Lords, the facts giving rise to this appeal are fully set out in the case stated by the special commissioners. These facts, and the question which arises, may be summarized as follows: The respondents hold, as trustees of the trust disposition and settlement of

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(1) [1946] A. C. 119, 149–50.
(2) Ibid. 150.
(3) Ibid. 158.
(4) [1940] A. C. 81, 91.

Joseph Reid, deceased, 3,433 shares of 10*l*. each, fully paid, in Reid Brothers (South Africa) Ld., a company incorporated and registered in South Africa, hereinafter referred to as "the "company." During the year in question the respondents received two dividends in respect of these shares. One was a dividend of 15 per cent. declared as "payable from the "company's trading profits for the year ended June 30, "1943." The other was a dividend of 20 per cent., or 2*l*. a share, and the special commissioners found as a fact that this latter dividend was paid "out of profits realized from the sale "of capital assets, to wit, four properties in Johannesburg "which belonged to the company and were occupied by it "as warehouse and office premises." That sale took place in March, 1943. It is not disputed that the former dividend is chargeable to income tax in the United Kingdom and the tax thereon has already been paid. It is contended by the appellants that the latter dividend also is chargeable to income tax in the United Kingdom as being "income "arising from possessions out of the United Kingdom" within case V. of sch. D. of the Income Tax Act, 1918. This contention is disputed by the respondents, who were successful before the Special Commissioners and in the First Division of the Court of Session.

Was this sum of 6,866*l*. received by the respondents on December 14, 1943, "income arising from possessions out of "the United Kingdom" within case V.? If the respondents had owned the four properties in Johannesburg which were sold in March, 1943, and if their agents in South Africa had remitted part of the proceeds of sale to the respondents, there would be no doubt that these moneys would form part of the capital of the trust and would not come within case V. In that event the respondents would merely have transformed one form of capital, the four properties, into another form of capital, cash, which would have to be invested as part of the trust capital. The respondents did not, however, own these four properties. They were owned by a different entity, namely the company. The respondents owned the 3,433 shares, and the "possession" from which the sum of 6,866*l*. "arose" was the shares.

This sum must be either income arising from that possession or part of the capital of that possession. Despite the ingenious argument of counsel for the respondents, I am clearly of opinion that it cannot be part of the capital of that possession.

No part of that possession has been sold; no part of the capital paid up on that possession has been returned. Before the payment was made, the respondents held 3,433 shares of 10*l.* each, fully paid, in the company; after the payment was made their holding was exactly the same. All that happened was that certain cash belonging to the company, and representing part of the profit realized by the sale of a capital asset belonging to the company, was paid away as a dividend. Your Lordships are not concerned to consider whether the company could or could not have given its shareholders the benefit of this profit in a form which would have been capital in the hands of the respondents. The directors, having this sum in their hands representing a profit which they were at liberty to distribute, very naturally decided to utilize it in paying a dividend.

For the reasons which I have briefly stated, I must reject the contention that this dividend came to the respondents as part of the capital of the "possession." It follows, I think, inevitably that the dividend is income arising from the "possession." Prima facie a dividend paid on shares is income. It has been held that even if a distribution by way of dividend has been made out of profits arising from some dealing with the company's capital assets, the distribution is income, as between the persons beneficially interested in capital and income respectively. See *In re Bates* (1); *Hill* v. *Permanent Trustee Company of New South Wales* (2); *In re Doughty* (3). None of these cases is binding on your Lordships' House, but I see no reason to differ from any of them. These cases are not decisions as to the incidence of income tax, and of course the destination of sums paid to the trustees of a will must depend upon the language used by the testator. The decisions are, however, helpful as showing that the word "income," when used in its ordinary sense, includes a dividend paid out of a profit of the kind that is sometimes called a "capital profit."

My Lords, I see no good reason for giving to the words "income arising from possessions out of the United Kingdom" some special meaning which would exclude from their scope the dividend now in question. This dividend is, I think, income according to the ordinary use of the word; it is part of the income of the trust estate in the hands of the respondents, and in holding it to be income within the meaning of this taxing provision your Lordships would in no way be disregarding the fact that income, and not capital, is the proper subject of taxation under an Income Tax Act.

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(1) [1928] Ch. 682.
(2) [1930] A. C. 720.
(3) [1947] Ch. 263.

Counsel for the respondents sought to base an argument, by analogy, on the position which would have arisen if the company had been incorporated in the United Kingdom, had sold capital assets in the United Kingdom and had paid this dividend out of a profit arising from such sale. In my view this argument only leads to confusion, for reasons which have already been fully stated.

I regret to find myself unable to accept the reasoning of the learned Lord President, with which the other two judges of the First Division agreed. Accepting the finding of the special commissioners that the sum in question was paid out of profits realized from the sale by the company of capital assets, I would agree that this sum, while it remained in the hands of the company, was not income of the company; but I must respectfully part company with the Lord President when he says (1) "this sum is not the income *of anyone*, "and never was." The italics are mine. For the reasons I have already stated, I think that it became income of the respondents when it was paid to them. The tree owned by the trustees, whereof this sum was the fruit, was their holding of 3,433 shares, and they have treated that fruit, rightly in my view, as belonging beneficially to the persons entitled to the income of the trust estate. If the sum in question were not the income of anyone, it surely could not rightly be so treated.

I would allow the appeal and answer in the affirmative the question of law set out in para. VI. of the case stated.

LORD MACDERMOTT. My Lords, had Reid Brothers (South Africa) Ld. been a British company, the respondents would not have been called upon to pay the tax now in dispute. They would have been shielded by the taxation of the company in respect of its profits, and in assessing that taxation the Crown, recognizing the basic principle that income tax is not a tax upon capital, would have ignored that part of the profits arising from the realization of the appreciated capital assets, such realization, as was conceded, not being in the way of trade. The result, on this hypothesis of a British

(1) 1947 S. C. 700, 707.

company, would therefore have been that the tax claimed by the Crown in these proceedings would not have been sought of anyone, company, trustees or beneficiaries. It is of importance to note, however, that this deliverance would not have flowed merely from the distinction observed between capital and income according to what I shall call the "true "income" rule. It would also have been due to the state of the law in this country which by a merciful if somewhat anomalous dispensation disregards in this connexion the juristic personality of the incorporated company and, in effect, treats its taxation as the taxation of its members. This principle, which finds reflection in the definition of "body "of persons" in s. 237 of the Act of 1918, I shall call the "representative" rule for lack of a better description. It has its limitations but these are not now material.

A return to the situation as it exists finds the respondents claiming that they are not assessable to tax on the dividend of 20 per cent. "payable," as the relevant resolution has it, "from capital profits realized on the sale of properties during "the past financial year." They rely upon the true income rule and they are free to do so because it is a fundamental and pervading principle. They also call in aid the representative rule, but this they are not entitled to do, for no assessment has or could have been made on the South African company and no theory based on the collective taxation of a number of persons is therefore available. The field of inquiry is thus considerably narrowed. The peculiarities of the law relating to the taxation of "bodies of persons" in this jurisdiction and the authorities bearing upon that and cognate subjects may therefore be put to one side leaving, as the matter for determination, the question whether this "capital profits" dividend is subject to charge, as the Crown claims, under case V. of sch. D. which provides for "tax in "respect of income arising from possessions out of the United "Kingdom."

Case V. does not, of course, extend the scope of the schedule as delineated by para. 1 thereof and what I have called the true income rule remains applicable. It is also clear that "possessions" in case V. must here refer to the shares held by the respondents in the company. That was conceded, and properly so, for in the absence of any evidence to the contrary it must be assumed that this company, which is incorporated and registered in South Africa, has the general characteristics of a British company incorporated under the Companies Acts and, accordingly, that the proprietory interest of its members is limited to their shareholding and does not include, at all events while the company is a going concern and its capital structure remains unaltered, "any right to "any item of property owned by the company." See *Macaura* v. *Northern Assurance Co. Ld.* (1), per Lord Buckmaster. This dividend, then, was income arising from the respondents' shareholding and the question accordingly reduces itself to this: Is it permissible, in order to determine the liability of the dividend to tax in the hands of the respondent shareholders, to look beyond the immediate source, the shareholding, and to examine the make-up of the profits out of which the dividend has been declared? In my opinion the answer must be in the negative. Apart from the difficulties of ascertaining in the United Kingdom the facts relating to the internal management of a foreign company, the process of exploring payments beyond their immediate source, if once admitted for this purpose, would have no end. The matter, however, does not rest merely on considerations of convenience or expediency. The respondents and the company are distinct entities and must be so regarded; but if the answer to the question now under discussion were in the affirmative the words of case V. "income arising from possessions" would have to read as relating to the possessions of the person charged or, at his option, to the possessions of someone else instead, and that is a construction for which I am unable to find any justification either in principle or authority. If I am right in this it means that the application of the true income rule has to be determined by reference to the dividend and the shareholding alone. But here the shareholding, which was the only relevant capital in the respondents' hands, rested as it was and the dividend cannot, therefore, be said to have contained an element of capital. No doubt the shares abated in market value after the payment of the dividend, but they nevertheless remained intact. The ripe tree loses weight and worth when it sheds its fruit, but the fruit remains fruit and no more unless in its fall it has taken part of the tree with it. For these reasons I am of opinion that the dividend in question fell within case V. and is subject to tax. I would, therefore, allow the appeal.

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(1) [1925] A. C. 619, 626.

LORD REID. My Lords, I think that the decision of this case depends on the question whether a dividend from a foreign company which comes to a shareholder in this country must in all cases be held to be received by him as income within the meaning of the Income Tax Acts. In this case the respondents held more than one-third of the shares in a company incorporated and registered in the Union of South Africa. That company does not trade in land. It held a considerable amount of land in or near Johannesburg and sold a part of this land which it did not need. A sum of over 17,000*l.* was estimated as profit on this sale and the greater part of this sum was distributed as a dividend. This dividend was declared by minute of the directors to be "payable from "capital profits realized on the sale of properties during the "past financial year." It is not disputed that if this had been a British company no income tax would have been payable by the company in respect of such profits. The phrase "capital profits" is not an accurate description of such profits but it is a convenient short name for them and I shall use it as such.

The main argument for the respondents depended on a comparison with the position which arises when a British company distributes capital profits as dividend. In that case there is no liability on the shareholders to pay income tax either at the standard rate or in the form of surtax on such a dividend. But the reason for that is not that what the shareholder receives is capital. It is that a shareholder is never directly assessable in respect of any dividend paid by a British company and that the surtax provisions in the Income Tax Acts do not impose any liability to pay surtax in respect of dividends paid by a British company out of profits which were not of a kind which is taxable in the hands of the company. It has frequently been pointed out that the Income Tax Acts treat payments by foreign companies quite differently from payments by British companies. I need only refer in this matter to *Canadian Eagle Oil Co. Ld.* v. *The King* (1). I think that little or no assistance towards the decision of the present case can be got from statutory provisions or authorities dealing with similar dividends paid by British companies.

The assessment in the present case was made under case V. of sch. D. in respect of income from possessions out of the

(1) [1946] A. C. 119.

United Kingdom. I do not think that there can be any doubt that the respondents' shares in the South African company were possessions out of the United Kingdom or that the dividend in question arose from those shares. The only question is: was that dividend received by the respondents as income within the meaning of sch. D.?

The question whether a capital dividend is capital or income in the hands of the shareholder who receives it may arise in trust administration. If a truster without giving any special directions to his trustees merely directs them to hold a fund including certain shares for one beneficiary in liferent and for another in fee, does a capital dividend from those shares go to the liferenter or must it be retained as part of the capital of the trust fund? It has been held in England that it goes to the tenant for life (*In re Doughty* (1)) and Scottish authority points to the same result (*Forgie's Trustees* v. *Forgie* (2)). In some cases the dividing line between capital and income is not the same for the purposes of income tax as for trust administration, but I see no reason why that should be so in this case. If a dividend ought to be regarded as income as between liferenter and fiar, I think that that points to its being income within the meaning of the Income Tax Act but it is not conclusive.

The crucial question in this case must therefore be decided with little direct assistance from authority. The contention for the Inland Revenue has the merit of extreme simplicity, if that be a merit in questions of income tax. It is that the dividend cannot be capital because the respondents' foreign possessions, the shares, remain intact, and therefore the dividend must be income. It is admitted that if the money had been paid by way of reduction of the share capital that would not have been income: the shares would not have remained the same. It is also admitted that if the surplus profits had been used to create bonus shares, or even it may be bonus debentures, there would have been no receipt of income: new capital assets would have been created. But it is said that so long as the capital asset abroad remains the same anything received by the shareholder in this country must be income subject to assessment under case V. of sch. D. This may seem a technical argument which neglects the real fact that the capital value of the respondents' foreign asset has been reduced by the making of the payment. But a

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(1) [1947] Ch. 263.

(2) 1941 S. C. 188.

H. L. (Sc.)

1949

INLAND REVENUE COMMISSIONERS *v.* REID'S TRUSTEES.

Lord Reid.

company can, and often does, reduce considerably the market value of its shares by paying a dividend out of accumulated trading profits, and there can be no doubt that such a dividend would fall within case V. if it came from a foreign company. There are many ways in which a company can deal with its profits. If it adopts certain methods the result is the creation of new capital assets. If it adopts other methods the result is the receipt of income by its shareholders. In either case it is immaterial whether the profits were trading profits or capital profits. It is true that, owing to the special provisions of the Income Tax Acts which distribute liability for income tax (including surtax) between a British company and its shareholders, a dividend paid by a British company out of its capital profits is not taxable. But there are no provisions applicable to a foreign company which bring about this result. I can find no satisfactory alternative to the view that, if a foreign company chooses to distribute its surplus profits as dividend, the nature and origin of those profits does not and cannot be made to affect the quality of the receipt by the shareholder for the purpose of income tax. I therefore agree that this appeal should be allowed.

Appeal allowed.

Solicitor for appellants: *Solicitor of Inland Revenue.*

Solicitors for respondents: *Ince, Roscoe, Wilson & Griggs for Simpson & Marwick W.S., Edinburgh, and Borland, King & Stewart, Glasgow.*

[PRIVY COUNCIL]

J. C.*

1949

Apr. 11.

YACHUK AND ANOTHER . . . . APPELLANTS;

AND

OLIVER BLAIS CO., LD. . . . RESPONDENT.

[AND CONNECTED APPEAL.]

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Ontario—Negligence—Petrol sold to child—Unaware of dangerous properties—Use for torch—Injury by burning—Normal mischievous propensities—Liability.

**Present:* VISCOUNT SIMON, LORD PORTER, LORD DU PARCQ and LORD MACDERMOTT.

J. C.

1949

YACHUK
v.
OLIVER
BLAIS
CO., LD.

The infant appellant, nine years of age, and accompanied by his younger brother, aged seven, having falsely represented to an employee at the respondent's gasoline station that he required some gasoline for his mother's motor-car which was "stuck down "the street," was supplied for five cents with about a pint of gasoline, half filling a lard-pail with a closely fitting, but removable, lid, which they had brought with them. The boys in fact wanted the gasoline to make torches to be used in a Red Indian game, and out of sight of, and some distance from, the gasoline station the infant appellant dipped a bulrush in the pail of gasoline, handed it, dripping, to his younger brother, and lighted it. The gasoline in the pail, which was between the boys, caught fire and the infant appellant was severely burned. On a claim by him against the respondent for damages for negligence:

Held, that the injuries suffered by the infant appellant must be attributed solely to the negligence of the respondent's employee, and that on the facts contributory negligence could not be imputed to the infant appellant. The negligence of the respondent's employee consisted in putting into the hands of a small boy, who, on the evidence, was no more capable of taking care of himself in the circumstances in which he was placed than a normal boy of his age might be expected to be, and who had no knowledge of the peculiarly dangerous explosive quality of gasoline, a dangerous substance with which a reasonable man, taking thought, would have foreseen that the child was likely to do himself an injury. To put a highly inflammable substance into the hands of a small boy was to subject him to temptation and the risk of injury, and that was no less true if the boy had resorted to deceit to overcome the supplier's scruples.

Principle stated by Lord Denman C.J. in *Lynch* v. *Nurdin* (1841) 1 Q. B. 29, at p. 38, applied.

The view of the Court of Appeal for Ontario, that "if one gives "to a child an explosive substance, and the child, with a limited "knowledge in respect to the likely effect of the explosion, is "tempted to meddle with it to his injury, it cannot be said in answer "to a claim on behalf of the child that he did meddle to his own "injury, or that he was tempted to do that which a child of his "years might reasonably be expected to do," was conclusive of the case in the light of the evidence.

Judgment of the Supreme Court of Canada [1946] S. C. R. (Can.) 1 set aside.

APPEAL and Cross-Appeal (No. 88 of 1946), by special leave, from a judgment of the Supreme Court of Canada (November 28, 1945) which restored the judgment of the trial judge in the Supreme Court of Ontario (May 29, 1944) which the Court of Appeal for Ontario had varied (December 19, 1944).

The following facts are taken from the judgment of the Judicial Committee. The relevant facts, as they were found by the learned judge at the trial, were that in the afternoon of July 31, 1940, the infant appellant, William Yachuk, then aged nine years, who was accompanied by a younger brother, then aged seven, went to the respondent's gasoline station in Kirkland Lake. A youth named Black, who was employed by the respondent, was then serving customers. The boys bought from him five cents' worth of gasoline. It appeared that the five cents were paid to Black by the younger boy, but " the transaction " (the learned judge found) " was with " the larger boy," who twice told Black that he wanted the gasoline to put in his mother's car which " was stuck down " the street." Black, who had been instructed that the gasoline in the pumps contained lead and ought not to be used for dry cleaning, then asked whether it was to be used for dry cleaning. The infant appellant replied that it was not, and repeated that it was needed for his mother's car. Black repeated his question, and received the same reply. The boys had provided themselves with a lard pail with a closely fitting, but removable, lid and Black, not without " real doubts and misgivings . . . . as to the propriety of " his sale " (which, in the learned judge's view, were justified) supplied them with about a pint of gasoline, half-filling the pail. That Black had doubts was indicated both by his question about dry cleaning, and by the fact that before the boys had gone beyond recall he told the assistant-manager about the sale, and said " That's all right, isn't it ? " The learned judge attached importance to the fact that the gasoline was not supplied in a " safety container," but in a receptacle which he found to be unsafe.

The story which the infant appellant told to Black was untrue. The boys' mother was in fact ill in bed. The five cents had been provided by her for the purchase of a confection known as chocolate milk. The boys wanted the gasoline to make use of it in a game in which they proposed to play the part of Red Indians, and to enact a scene which they had witnessed in a moving picture. For that purpose torches were required, and it had occurred to them that by soaking in gasoline some bulrushes which they had gathered and setting them alight with matches, satisfactory torches might be made. They had failed to obtain the necessary gasoline from another station in the neighbourhood, where it had been refused at first because they brought with them a glass container, and later, when they arrived with the lard pail, because (the learned judge thought) "they told a different "story on this occasion." It was after the latter rebuff that they visited the respondent's station and were successful.

The sequel, in the learned judge's own words, was: "The "boys took the pail of gasoline with which they started out "in the general direction in which they had indicated that "their mother's car was stranded. They went to a lane, "out of sight of the gas station and some distance away "from it. The infant plaintiff then sent his brother to the "house for the bulrushes and some matches, and, when the "brother returned, the infant plaintiff dipped one of the "bulrushes in the pail of gasoline and handed the dripping "bulrush to the smaller brother and then lighted it. The "bulrush in the brother's hand flared up and he, being "frightened, tried to beat it out on the ground. At that time, "the boys were standing about four feet apart with the pail "of gasoline open, midway between them. The gasoline "in the pail, the boys say, caught fire from the bulrush with "a swishing sound, although they say that when the bulrush "was beaten on the ground there were no sparks." The unhappy result was that "the infant plaintiff was most "painfully and seriously burned."

The infant appellant, who sued by his father as next friend, and Tony Yachuk (the father suing in his own right) were plaintiffs, and the Oliver Blais Co., Ld., was defendant, in an action begun in January, 1943, in the Supreme Court of Ontario, in which the plaintiffs claimed damages for negligence and breach of statutory duty. Of the alleged breach of statutory duty all that need now be said was that no argument was addressed to their Lordships' Board in support of that head of the claim. The negligence alleged consisted in supplying the infant plaintiff with a small quantity of gasoline, with the result that he suffered injury, and his father was put to expense. The first hearing of the action was abortive, as a new trial was ordered on appeal. The case was ultimately tried by Urquhart J., who, for reasons which were now irrelevant, discharged a jury before whom the hearing had begun, and proceeded to hear and determine the case without their assistance. The learned judge found that there was negligence on the part of the defendant company, and that its negligence was a cause of the injuries which the infant plaintiff had sustained. He further found that there was contributory negligence on the part of the infant plaintiff.

He assessed the damages at $8,000 in respect of the infant plaintiff and $2,712.75 in respect of the adult plaintiff, but, inasmuch as he regarded the infant plaintiff as "seventy-five "per cent. responsible" for his own injuries, he apportioned the damages, as between the defendant company and each of the plaintiffs, in proportion to the degree of negligence so found. It was therefore adjudged that the infant plaintiff should recover $2,000 and his father $678.19. The question whether the terms of the Negligence Act (R. S. O. 1937, c. 115) could justify, on any view of the facts, that reduction of the damages awarded to the father did not appear to have been argued before the learned judge. It was answered in the affirmative by two judges of the Supreme Court of Canada. As will appear, no other judge had occasion to pronounce on it, and their Lordships' Board did not find it necessary to consider it.

The plaintiffs appealed, and the defendant cross-appealed to the Court of Appeal for Ontario. A judgment, with which Robertson C.J.O. and Roach J.A. expressed their agreement, was delivered by McRuer J.A. The appeal of the plaintiffs was allowed, the court holding that the defence of contributory negligence failed. The cross-appeal was dismissed. The order of the court was that judgment should be entered for the full amounts at which Urquhart J. had assessed the damages, without deduction.

From that order the defendant appealed to the Supreme Court of Canada. Of the five judges who heard the appeal two, Rinfret C.J. and Kerwin J., were of opinion that the appeal should be allowed and the action dismissed, holding that negligence could not be imputed to the defendant's salesman. The other three (Hudson, Rand and Estey JJ.) were all agreed that there was negligence on the part of the defendant's salesman, but whereas Hudson and Estey JJ. thought that the trial judge was right in his finding of contributory negligence, and in reducing the damages accordingly, Rand J. agreed with the decision of the Court of Appeal for Ontario. In the result an order was made restoring the judgment of Urquhart J. That result satisfied neither plaintiffs nor defendant, and each side sought and obtained leave to appeal to His Majesty in Council, the defendant by way of cross-appeal.

1949. March 3, 7, 8, 9. *Diplock K.C.* and *Quintin Hogg*

J. C.
1949
YACHUK
v.
OLIVER
BLAIS
CO., LD.

for the appellants. The appeal raises two main issues: first, liability at common law, namely, was the respondent negligent, and if so, (i) did the respondent's negligence cause the injuries, and (ii) was the infant appellant guilty of contributory negligence; secondly, which only arises if the Board are against the appellants on the first issue, whether, in the event of the infant appellant being guilty of contributory negligence, the adult appellant's damages can be reduced thereby. On the first issue it is submitted, (A) it is negligent to place in the control of a child an article which is likely to cause injury to the child if the child exercises the mischievous propensities natural to its age; (B) the essence of the negligence in such a case is that the defendant ought reasonably to have foreseen the likelihood of the child putting the article to that use; and (C) the fact that the child puts the article to the dangerous use which ought reasonably to have been foreseen is neither a novus actus interveniens breaking the chain of causation, nor can it be relied on as contributory negligence. In the present case the negligence itself was putting into the control of the child something which was likely to cause injury if mischievous propensities were exercised: *Lynch* v. *Nurdin* (1), *Clark* v. *Chambers* (2), *Glasgow Corporation* v. *Taylor* (3) and *Latham* v. *R. Johnson & Nephew, Ld.* (4) represent the law applicable. One is only under a duty to avoid an act or omission which it can reasonably be foreseen will be likely to cause injury, but here the respondent's employee ought to have anticipated that the children would use the gasoline in the way they did. Whatever duty he owed, he was in breach of it at that time. The standard of contributory negligence is the same as the standard of negligence, and the standard required from a child cannot vary according to whether he is plaintiff or defendant in an action. The standard of care is that which is natural to a child of that age. [Reference was made to *Farr* v. *Butters Bros. & Co.* (5); *Boy Andrews* (*Owners*) v. *St. Rognvald* (*Owners*) (6); The Negligence Act (R. S. O. 1937, c. 115), s. 2, sub-s. 1; s. 3; and the Law Reform (Contributory Negligence) Act, 1945 (8 & 9 Geo. 6, c. 28), s. 1.] There was an inconsistency in findings of negligence on the part of the respondent's employee and of contributory negligence of the infant appellant in this

(1) (1841) 1 Q. B. 29, 36-8.
(2) (1878) 3 Q. B. D. 327.
(3) [1922] 1 A. C. 44.
(4) [1913] 1 K. B. 398, 413-4.
(5) [1932] 2 K. B. 606, 614.
(6) [1948] A. C. 140.

kind of case, and the reason for the inconsistency was that the trial judge and two judges of the Supreme Court were applying the wrong standard of prudence, for instead of directing their minds to the normal child of that age, they were considering some specific standard of prudence which that particular child should have exercised because, as the trial judge said, he was a bright and intelligent child. There are two defects in the judgment of the trial judge, and reliance is placed on both: (*a*) he is saying, quite apart from the particular knowledge possessed by the infant appellant, that he was of a brightness and intelligence above the average and therefore should adopt a higher standard of prudence than an ordinary child of that age; and (*b*) the second defect is his finding of the child's knowledge about the properties of gasoline. The knowledge on which the judge relied as negligence was just that very knowledge which led the child to do this very thing. The Court of Appeal for Ontario were right in drawing attention to the fact there was no evidence to indicate that the child knew that gasoline would flare up, and that the fumes would be likely to ignite and cause the gasoline in the pail to burn.

[He was stopped.]

Gahan for the respondent. It does not follow, because a child does a negligent act, that somebody else is responsible for injury or damage resulting from that act. In this case the events preceding the purchase of the gasoline showed that the children fully realized that they were doing wrong; there was no sudden temptation put in their way, no allurement or incitement or infantile folly, or anything of that sort; there was a plain scheme on the part of the children, who knew that they could not carry it out without deception. To give a child a pail of molten lead to carry a hundred yards would be a negligent act, but gasoline, which the child would be familiar with, is not a substance with some obvious extraordinary danger; it becomes dangerous only if used in a negligent manner. The act of the child here was facilitated by the act of the salesman, but not in any way induced by it; there was no temptation of the child. With regard to the circumstances of the sale, the children came with the intention of deceiving. The evidence only goes to show that the salesman did not disbelieve their statement that their mother's car was stuck down the street, but that

J. C.

1949

YACHUK
v.
OLIVER
BLAIS
CO., LD.

he had doubts about it. The doubt in his mind was, is the mother's car stuck down the street or is the mother getting gasoline for dry-cleaning. In all the circumstances attending the sale there was no evidence of negligence in a reasonable salesman. The general statement is set out in *Glasgow Corporation* v. *Muir* (1), where it is said that "legal liability "is limited to those consequences of our acts which a "reasonable man of ordinary intelligence and experience "so acting would have in contemplation." [Reference was also made to *Hay* (*or Bourhill*) v. *Young* (2); *Glasgow Corporation* v. *Taylor* (3); *Lynch* v. *Nurdin* (4); *Towne* v. *British Columbia Electric R. Co.* (5); and *Mayer* v. *Prince Albert* (6).] It was not within the range of reasonable foresight or anticipation by the respondent's employee that the infant appellant would use gasoline for the foolhardy and extraordinary purpose of lighting bulrushes. The act of the salesman in supplying the gasoline was not the effective cause of the accident, which was due to the intervening acts of the infant appellant and his brother. The injury would not have occurred if there had not been some severable conscious act by the children. The evidence establishes that the infant appellant well knew that he was doing a dangerous act, and the trial judge rightly found him guilty of negligence. Alternatively, if the salesman were in any way negligent, his was an antecedent negligence which would have caused no harm but for the infant appellant's subsequent negligence, which in law is to be treated as the sole effective cause of the accident. If, contrary to the submission for the respondent, the salesman was guilty of negligence contributing to the accident, the infant appellant was also negligent and Urquhart J. made a proper apportionment of the damages.

No reply was required.

April 11. The judgment of their Lordships was delivered by LORD DU PARCQ, who, after stating the facts set out above, continued: On these facts the learned trial judge found "that under all the circumstances of the case, Black should "have reasonably anticipated that the gasoline might be "used for a dangerous purpose by these two young lads" and held that his negligence contributed to cause the injuries which the infant appellant suffered. As appears from the summary of the proceedings, all the courts in Canada have concurred in these findings, although the Court of Appeal for Ontario went further, holding that contributory negligence could not be imputed to the infant appellant and that his injuries must be attributed solely to the negligence of the respondent. It would be contrary to the well-known rule of practice by which their Lordships are guided to reject these concurrent findings of fact. In their Lordships' opinion it is hopeless to contend that there was not evidence to support the findings. Not all the reasons given for them by the learned judge seem to their Lordships to be equally convincing, but the evidence taken as a whole, in their view, fully substantiates the conclusion at which both the judge and the two appellate courts in Canada arrived on these matters. The rule as to concurrent findings is none the less applicable when the decision of a court is not unanimous: see *Robins* v. *National Trust Co.* (1); *Srimati Bibhabati Devi* v. *Kumar Ramendra Narayan Roy* (2).

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(1) [1943] A. C. 448, 457.
(2) [1943] A. C. 92, 101.
(3) [1922] A. C. 44.
(4) (1841) 1 Q. B. 29, 37.
(5) [1943] 3 D. L. R. 572.
(6) [1926] 4 D. L. R. 1072, 1075.

It was contended on behalf of the respondent, at their Lordships' bar, as it had been, without success, at the trial, that assuming its employee to have been negligent, the subsequent acts of the infant appellant were the real cause of his injuries, and were an intervening cause, or novus actus interveniens, to which alone those injuries should be ascribed. Alternatively, the defendant relied on the finding of the learned judge, supported as it was by the judgment of the Supreme Court of Canada, that there was contributory negligence on the part of the infant plaintiff. The latter of these submissions accords with the judgment under appeal, and it is convenient to deal with it at once. The negligence of the respondent consisted in putting into the hands of a small boy a dangerous substance with which a reasonable man, taking thought, would have foreseen that the child was likely to do himself an injury. The fact that the boy told an untruth in order to persuade Black to give him the gasoline, a fact on which the respondent's counsel much relied, cannot avail the respondent in view of the learned judge's finding that Black's doubts as to the propriety of the sale were justified. To put a highly inflammable substance into the hands of a small boy is to subject him to temptation and the risk of injury, and this is no less true if the boy has resorted to deceit in order

(1) [1927] A. C. 515, 517.

(2) [1946] A. C. 508, 521.

to overcome the suppliers' scruples. The child's deceit can afford no excuse to the supplier when it is found that the story told was such as to arouse, rather than allay, suspicion in the mind of a reasonable man. In the circumstances, therefore, their Lordships think that McRuer J.A. was right in applying to this case the principle stated by Lord Denman C.J. in *Lynch* v. *Nurdin* (1): "The most blameable carelessness "of this servant having tempted the child, he [the defendant] "ought not to reproach the child with yielding to that "temptation. He has been the real and only cause of the "mischief. He has been deficient in ordinary care: the child, "acting without prudence or thought, has, however, shown "these qualities in as great a degree as he could be expected "to possess them. His misconduct bears no proportion "to that of the defendant which produced it." The negligence of the respondent's servant in the present case may call for less severe condemnation than these words express: the principle which they embody is none the less applicable.

Urquhart J. was led to his finding of contributory negligence by the view which he formed as to the special characteristics of the infant plaintiff. He found that the boy was "mentally "alert" and "bright," and said of him: "He would be quite "capable of being guilty of contributory negligence in the "abstract and also in respect of the handling of gasoline "and gasoline fires. He knew the danger of matches. His "father had gasoline in his workshop, which was attached "to the house. The [infant] plaintiff admitted that he had "before the occurrence watched gasoline in his father's torch "and had been with his father on a job or two, had seen his "father lighting his torch and knew that there was gasoline "in it, and had been told by his father to keep away from "the torch. His father would not allow the children into "the workshop" (in which he worked as a plumber). "I have no doubt," the learned judge added, "that the boy "fully appreciated that gasoline was a dangerous substance, "and had considerable knowledge that it burned in no ordinary "manner." It was contended on behalf of the appellants that the learned judge's findings were illogical and inconsistent. Black was negligent because he ought to have recognized that a boy of the age of the infant appellant not only lacked knowledge and experience, but was likely to have mischievous propensities. These defects being characteristic of the normal

(1) (1841) 1 Q. B. 30, 38.

boy, it was impossible (so ran the argument) to impute to this boy, whatever exceptional training or experience he might have had and however reckless he might appear to have been, any failure to take reasonable care for his own safety. In other words, he could not be found guilty of contributory negligence.

Their Lordships do not find it necessary to decide whether there is a necessary inconsistency, in all cases in which the defendant owes a duty to show special care in his dealings with a child, in a finding of negligence by the defendant coupled with one of contributory negligence by an infant plaintiff. If the evidence had shown that the infant appellant in the present case had in fact greater knowledge of the dangerous properties of gasoline than would be imputed normally to a child of his age, a more debatable question would have arisen. A careful examination of the evidence has satisfied their Lordships that the boy had no knowledge of the peculiarly dangerous quality of gasoline. He knew, no doubt, that an object soaked in gasoline could be ignited with a match. He did not know, and there is no evidence that he had ever been told, that gasoline was a volatile liquid capable of producing a highly inflammable vapour likely to burst into flame if heat were brought near it. He knew (he said in his evidence) that " it would burn like a match . . . . " after you strike it." His father said that he had never warned him about gasoline, because he did not think that a boy could buy it. The boy himself said, what is likely enough, that his father had told him to keep away from his gasoline torch, but that he was " pretty sure " that neither of his parents had ever warned him " to be careful with gasoline." On the evidence it is, in their Lordships' view, impossible to regard him as any more capable of taking care of himself in the circumstances in which he was placed than a normal boy of his age might be expected to be. In the words of Denman C.J., although he may be said to have acted "without " prudence or thought," he " showed these qualities in as " great a degree as he could be expected to possess them." It is a fair inference from the evidence that it was the very property of gasoline which he neither knew, nor could be expected to know, which brought about his misadventure. Their Lordships are accordingly of opinion, in agreement with the Court of Appeal for Ontario, that on the facts of this case the finding of contributory negligence cannot be supported.

J. C.
1949
YACHUK
v.
OLIVER
BLAIS
CO., LD.

It follows from what their Lordships have already said that the attempt to attribute the disaster which happened solely to the acts of the infant appellant must fail. That defence cannot, indeed, be maintained in the light of the concurrent findings of fact in this case, for when once the negligence of the respondent's servant has been found to have contributed to cause damage to the appellant, it is impossible to say that a new cause has intervened so as to relieve the respondent of all responsibility for the evil consequences which followed his wrongful act. Their Lordships will add, however, that even without regard to the rule of practice as to concurrent findings they would have had no difficulty in arriving at the same conclusion. However the case is put, the answer made by McRuer J.A. in the Court of Appeal for Ontario, seems to their Lordships to be conclusive in the light of the evidence: " If one gives to a child an explosive " substance, and the child, with a limited knowledge in respect " to the likely effect of the explosion, is tempted to meddle " with it to his injury, it cannot be said in answer to a claim " on behalf of the child that he did meddle to his own injury, " or that he was tempted to do that which a child of his years " might reasonably be expected to do."

Their Lordships will humbly advise His Majesty that the appellant's appeal should be allowed, the judgment and order of the Supreme Court of Canada set aside, the judgment and order of the Court of Appeal for Ontario of December 19, 1944, restored, and the cross-appeal of the respondent dismissed. The respondent must pay the appellant's costs of the appeal to the Supreme Court of Canada and of the appeal and cross-appeal to His Majesty in Council.

Solicitors for appellants: *Ridsdale & Son.*
Solicitors for respondent: *Lawrence Jones & Co.*

H. L. (E.)*

1949

Jan. 24, 25, 26; Feb. 28.

[HOUSE OF LORDS.]

CUTLER . . . . APPELLANT;

AND

WANDSWORTH STADIUM LD. . . RESPONDENTS.

Gaming and wagering—Betting—Dog-racing track—Use of totalisator—Provision for bookmakers—" Space . . . . where they can " conveniently carry on bookmaking "—Action at suit of individual bookmaker—Betting and Lotteries Act (24 & 25 *Geo.* 5, *c.* 58), *s.* 11, *sub-s.* 2 (*b*); *s.* 30, *sub-s.* 1.

No action lies at the suit of an individual bookmaker against the occupier of a licensed dog-racing track on which a totalisator is lawfully in operation for failure to provide him with " space " on the track where he can conveniently carry on bookmaking," in accordance with s. 11, sub-s. 2 (*b*) of the Betting and Lotteries Act, 1934. The obligation imposed by that section is enforceable only by criminal proceedings for the penalties specified in s. 30, sub-s. 1, of the Act.

Decision of the Court of Appeal, [1948] 1 K. B. 291, affirmed.

APPEAL from the Court of Appeal (Lord Greene M.R., Somervell L.J. and Singleton J.).

The appellant was a bookmaker who, with other bookmakers, carried on the business of bookmaking on a part of the greyhound racing track at Wandsworth Stadium, which was occupied by the respondents. It was in evidence that the respondents' totalisator there had earned for them in one year a gross profit of nearly 200,000*l*. On May 31, 1944, the appellant issued a writ against the respondents claiming (inter alia) (1.) a declaration that he was entitled to enter the respondents' dog-racing stadium; (2.) a declaration that he was entitled to the use of a space on the track at the stadium where he could conveniently carry on his business as a bookmaker in connexion with the races run on the track; (3.) a declaration that a space from which he was not able to have a clear view of the running of the dogs in the races was not a convenient space for the carrying on of his business; (4.) a declaration that a space on which he could not have a fair chance of entering into competition with the totalisator at the track for obtaining betting business was not such a convenient space; (5.) an injunction restraining the respondents from excluding him from the track on days on which dog races were run; (6.) an order requiring the respondents to secure for him a space on the track where he could conveniently carry on bookmaking on days on which dog races were run. He also claimed damages for breach of statutory duty. After various interlocutory proceedings, Oliver J., having already, by way of preliminary judgment, decided that the appellant had a right of action, made an order on October 30, 1946, whereby he decided that a certain area, being part of the respondents' track, was "space within the "meaning of s. 11, sub-s. 2 (*b*), of the Betting and Lotteries "Act, 1934"; and granted an injunction restraining the respondents, so long as a totalisator was being operated on the track, from excluding the appellant from the track, by reason only of the fact that he was proposing to carry on bookmaking thereon, and further awarded him 150*l*. by way of damages. The Court of Appeal reversed this decision. The appellant appealed to the House of Lords.

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*Present: LORD SIMONDS, LORD DU PARCQ, LORD NORMAND, LORD MORTON OF HENRYTON and LORD REID.

Pritt K.C., *Platts Mills* and *Patrick O'Connor* for the appellant. The principles applicable are laid down in Winfield on Torts (4th ed.), p. 156, s. 38 and Salmond on Torts (10th ed.) p. 505. *Groves* v. *Wimborne* (*Lord*) (1) is the leading authority and contains most of the law. This is the first time the House of Lords has had occasion to consider it. The other relevant authorities are *Brittannic Merthyr Coal Co. Ld.* v. *David* (2); *Phillips* v. *Brittannia Hygienic Laundry Co. Ld.* (3); *Pasmore* v. *Oswaldtwistle Urban District Council* (4); *Wolverhampton New Waterworks Co.* v. *Hawkesford* (5); *Institute of Patent Agents* v. *Lockwood* (6); *Monk* v. *Warbey* (7); and *Square* v. *Model Farm Dairies* (*Bournemouth*) *Ld.* (8). On its true construction s. 11, sub-s. 2, of the Betting and Lotteries Act, 1934, creates a cause of action in the class protected by that section for damages caused by breaches of the statutory duties imposed by it. The appellant is a member of that class and is entitled to a cause of action. He is in the class of bookmakers and it does not matter whether that class is wide or narrow, definite or indefinite, with a well-defined

(1) [1898] 2 Q. B. 402, 406, 413.
(2) [1910] A. C. 74.
(3) [1923] 2 K. B. 832.
(4) [1898] A. C. 387.
(5) (1859) 6 C. B. N. S. 336.
(6) [1894] A. C. 347, 361.
(7) [1935] 1 K. B. 75.
(8) [1939] 2 K. B. 365.

or an ill-defined boundary. The class of factory workers, for example, is both wide and ill-defined. It cannot be right to decide against the appellant merely because the exact limitations of the class are hard to define. The obligation imposed by s. 11 was intended primarily, if not solely, for the benefit of bookmakers. For the purposes of this case only ss. 11, 12, 13, 14, 29 and 30 need be regarded. Accordingly the appellant belongs to a class with an interest and right to enforce the duty. By s. 11, it is true, an unqualified right was not given indiscriminately to all bookmakers as defined by s. 20, sub-s. 1. The relevant class, to which the appellant belongs, is that of the bookmakers resorting to any particular track for the purposes of betting thereon, as set out in s. 11. Thus the members of the group who had been in regular attendance at each dog racing track when the Act came into force acquired an individual right to enforce the performance of the duty at that track. The position with regard to new tracks opened after the Act came into force is not relevant. The history of the matter is that before the Act bookmakers taking bets at dog racing tracks had no legal right to be there. There existed only the practice and habit of their resorting thither and being admitted. So that, apart from the law, they had a vested interest in that way of making their living. Then the totalisator was introduced as a competitor and the Act gave the bookmakers legal provisions for their protection to enable them to compete on equal terms with the totalisator. In these circumstances it is easy to infer that an aggrieved bookmaker has a civil remedy under s. 11, sub-s. 2 (*a*). The rule stated in *Doe* v. *Bridges* (1) that "where an Act creates an "obligation, and enforces the performance in a specified "manner . . . . that performance cannot be enforced in "any other manner" has no application where the statutory remedy is by way of criminal proceedings which may result in a penalty or imprisonment. There remain to be dealt with specific points raised in the judgments in the Court of Appeal. As to the suggestion that what the appellant contends for would confer on bookmakers a privilege which they never possessed before, there is no reason why the legislature should not give them something new. As to the comparison between the interests of the bookmakers and those of the public, the right way to construe the Act is not to consider priorities, to say that the primary object of the Act is to give the public the right to bet with the bookmakers and not the other way about. The test is whether there are provisions to enable the bookmakers to carry on their business. The public is not mentioned in s. 2 nor in s. 4, nor in s. 10, nor in s. 13. In s. 11 bookmakers alone are dealt with and s. 14 provides direct protection for them. So far as the wording of the vital sections goes it appears that the bookmakers' interests are being definitely protected. Even if the public is more important, that does not take away the bookmakers' rights. Further, if a cause of action is given to the bookmakers, this does not necessarily involve giving a cause of action to members of the public too. For example, suppose the buskers who entertain theatre queues were given a statutory right to a particular space in which to perform and the police and the theatre owners were placed under a duty to provide it that might give a right of action to individual buskers but not to the public who enjoyed their performances. As to the comparison between paras. (*a*) and (*b*) of sub-s. 2 of s. 11, the appellant was entitled to his right of action under the one as much as under the other. As to the adequacy of the penalty provisions, these are not enough. Any possible criminal proceedings would be insufficient as a remedy and might be burdensome. A bookmaker might lose many days' profit and his goodwill too by reason of being excluded from the track and the penalty provisions would give him no remedy. He has no control over any police proceedings. Further, in half the cases where a civil action would succeed a criminal prosecution would not, because of the higher standard of certainty required in the proof. This type of question is better tried in a civil court. Moreover, in criminal proceedings he would have no appeal. Therefore he is not just as well protected by criminal as by civil proceedings. Further, the fact that on a conviction the licence of the offender is put in peril by s. 16, sub-s. 1, might make the jury hesitate to convict. As to the suggestion that the severity of the penalties imposed indicates that the legislature had in mind only the public interest, it is a non sequitur to say that because something which injures a private individual is so serious that a prosecution is permitted, therefore the private interest is not being regarded. Moreover, having regard to the extent of the business done, the financial penalties are not really severe for a first offence. Fines of 100*l*. or 500*l*. are, in cases like this, a mere bagatelle. There are many reasons for making these actions criminal offences both in the interests of the public and of the bookmakers. From another point of view the possible alternative of an action might be preferable to the culprit in the case of a string of offences. Again a prosecution, from the point of view of determining the existence of rights, would not, in general, bind any but the actual parties, whereas a decision in an action would be authoritative. As to the alleged difficulty of assessing the loss suffered by a bookmaker through being excluded from the place where he is entitled to be, this is not insuperable. In this respect the loss suffered if he is kept out by a policeman is no different from the loss suffered if he is kept out by a motor-car accident. The court can assess the damages in the former case just as well as in the latter. In any event, the difficulty of assessing damages is irrelevant. So also the difficulty of framing a declaration or an injunction is no argument against the existence of the cause of action.

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(1) (1831) 1 B. & Ad. 847, 859.

Platts Mills following. The Racecourse Betting Act, 1928, which legalized the use of totalisators, did not apply to dog racing tracks or to any sporting events but horse-racing. There is no legitimate comparison between the position before and after that Act and the position before and after the Act of 1934, because bookmakers needed no protection from the Racecourse Betting Control Board set up by the Act of 1928. No argument save one favourable to the appellant can be drawn from the earlier Act, because of the different scene with which the legislature was presented in 1934, when there was competition to set up totalisators and also for those who did so to keep all the profits for themselves. There was very serious competition for the bookmakers and the hard bargaining for the protection of the interests affected is reflected in the Act. The difference of approach is reflected in the wording: see s. 3, sub-s. 2, of the Act of 1928: ". . . . to which the public may resort for the purpose of "betting" and s. 11, sub-s. 2 (*b*), of the Act of 1934 ". . . . "available for bookmakers space on the track where they can "conveniently carry on bookmaking," these words emphasizing the rights of the bookmakers. This is a common law action, an action on the case for breach of a statutory duty and the public could not conceivably have a right of action. As to the class of bookmakers, these are sufficiently defined. Lord Greene M.R. in this case aptly used the word "fraternity." The essence of bookmaking is that the bookmakers should balance the book they make in the ring, so that a system works among themselves. The definition of "bookmaker" in s. 20, sub-s. 1, refers to a person who "carries "on . . . . the business of receiving or negotiating bets"; it does not include any person who cares to offer to make a book. The true issue is not to find who conceivably could be within the definition but whether the appellant is within it. There can be no doubt that he is.

Sir Valentine Holmes K.C., *Paget K.C.* and *Peter Bristow* for the respondents were not called on to argue.

The House took time for consideration.

Feb. 28. Lord Simonds. My Lords, this appeal, which is brought from an order of the Court of Appeal setting aside a judgment given by Oliver J. in favour of the appellant, can be determined upon a preliminary point, and your Lordships need not be troubled by a detailed narration of the facts which occupied the time of the learned trial judge for many days. The single question, which your Lordships decide, is whether on the true construction of the Betting and Lotteries Act, 1934, the appellant has, on the assumption, which for this purpose I make, that the respondents have committed a breach of s. 11, sub-s. 2 (*b*), of the Act, a right of civil action against them. This question was answered in the affirmative by Oliver J., in the negative by the Court of Appeal.

The appellant is a bookmaker, who, before the proceedings which gave rise to this appeal, carried on the business of bookmaking on a part of a greyhound racing track known as the Wandsworth Stadium which is occupied by the respondents. I do not think it necessary to state any further details about the track or the manner in which the appellant and his fellow bookmakers carried on their business. For I am content to assume, without expressing any opinion about it, that the respondents have committed a breach of their statutory obligations.

Before the passing of the Act betting by means of the "totalisator" (a mechanical application of the pari-mutuel) on dog-racing tracks was illegal and betting on such tracks was carried on by the public with bookmakers only. Thus bookmakers, though they had no absolute right of entry on any such tracks, had a monopoly of betting on the track if they were not excluded, and they were not likely to be excluded.

It was otherwise with horse racecourses. For by the Racecourse Betting Act, 1928, the use of totalisators on such courses had already been legalized.

It was in these circumstances that the Act of 1934 was passed. Its full title may be recalled, "An Act to amend "the law with respect to betting on tracks where sporting "events take place, including the law with respect to "totalisators on horse racecourses: to authorize, subject to "restrictions, the establishment of totalisators on dog "racecourses: to prohibit betting on tracks with young "persons and pari-mutuel betting except by authorized "totalisators: to amend the law with respect to lotteries "and certain prize competitions; and for purposes connected "with the matters aforesaid." It is, as its title suggests, an Act which in various respects regulates the conduct of racecourses and in particular authorizes or restricts, as the case may be, the means and methods of betting on such courses. There is nothing in it to suggest that it is the charter of bookmakers. Part I of the Act which is headed "Betting" consists of the first twenty sections. By s. 1 the number of days in any year on which betting by way of bookmaking or by means of a totalisator may take place on any track is limited. Contravention of this section is an offence under the Act. By s. 2, sub-s. 1, it is provided that "Bookmaking "shall not be carried on on any track unless the occupier "of the track is the holder of a licence in force under this "part of this Act authorizing the provision of betting facilities "on that track." To this sub-section there are certain provisoes which I need not mention. Here too contravention is an offence under the Act. By s. 3, sub-s. 1, it is provided that "No pari-mutuel or pool betting business shall be carried "on on any track" except as therein provided. Again contravention is an offence under the Act. Section 4 prescribes the number of races and the period of hours on and in which betting by way of bookmaking or by means of a totalisator may take place. Once more contravention is an offence. I can pass over the other sections and come to s. 11, and, as it is the section on which the appellant founds his claim, I will state it in full: "(1.) Notwithstanding any "enactment or rule of law to the contrary, it shall be lawful "on any licensed track being a dog racecourse for the occupier "of the track or any person authorized by him in writing— "(*a*) to set up and keep a totalisator, whether in a building "or not; and (*b*) on any appointed day, while the public "are admitted to the track for the purpose of attending "dog races and no other sporting events are taking place "on the track, to operate a totalisator so set up, but only "for effecting with persons resorting to the track betting "transactions on dog races run on that track on that day; "and for any person to effect betting transactions by means "of a totalisator lawfully operated. (2.) The occupier of "a licensed track—(*a*) shall not, so long as a totalisator is "being lawfully operated on the track, exclude any person "from the track by reason only that he proposes to carry "on bookmaking on the track; and (*b*) shall take such steps "as are necessary to secure that, so long as a totalisator is "being lawfully operated on the track, there is available for "bookmakers space on the track where they can conveniently "carry on bookmaking in connexion with dog races run on "the track on that day; and every person who contravenes, "or fails to comply with, any of the provisions of this "sub-section shall be guilty of an offence." Section 12 enacts (with certain provisoes) that "Nothing in the Betting "Act, 1853, shall apply to anything done on any licensed "track by a bookmaker on any day on which bookmaking "may be lawfully carried on on the track," and s. 13 prescribes the maximum charges for admission that may be made by the occupier of a licensed track to a bookmaker or his assistant. Section 14 prohibits the occupier of a licensed track and the other persons therein mentioned from engaging directly or indirectly in bookmaking on that track. Contravention is made an offence under the Act. Section 16, sub-s. 1, enables the licensing authority to revoke a licence in respect of a track in its area (inter alia) "if the holder of the licence or, where "the holder is a corporate body, any director or the manager "thereof is convicted of any offence under this Part of this "Act or under the first schedule to this Act or of any offence "involving fraud or dishonesty." By s. 17 it is provided that nothing in that part of the Act "shall be construed as "requiring the occupier of a licensed track to permit betting "thereon at any time at which no totalisator is being operated "on that track." Section 18 deals with the powers of the Racecourse Betting Control Board under the Racecourse Betting Act, 1928, and is not strictly germane to these proceedings. Section 20 includes a number of definitions, including a very wide definition of "bookmaker." That ends Part I. I need not refer to Part II. Part III contains the penalty clauses which are as follows: "29. Where a "person convicted of an offence under this Act is a body "corporate, every person who at the date of the commission "of the offence was a director or officer of the body corporate "shall also be deemed to be guilty of that offence unless he "proves that the offence was committed without his knowledge. "30.—(1.) A person guilty of an offence under s. 1, s. 2, "s. 3, or s. 11, or under any section contained in Part II "of this Act shall be liable (*a*) on summary conviction, to a "fine not exceeding one hundred pounds, and in the case "of a second or any subsequent conviction for an offence "under the same section, to imprisonment for a term not "exceeding three months or to a fine not exceeding two "hundred pounds or to both such imprisonment and such "fine; or (*b*) on conviction on indictment, to a fine not "exceeding five hundred pounds, and in the case of a second "or any subsequent conviction for an offence under the same "section, to imprisonment for a term not exceeding one year "or to a fine not exceeding seven hundred and fifty pounds "or to both such imprisonment and such fine."

As I have already indicated, the question on this appeal arises on s. 11, sub-s. 2 (*b*) of the Act. The appellant being, as he alleged, illegally deprived of his rights under this sub-section, on May 31, 1944, issued his writ against the respondents. He claimed a number of declarations of his rights, an injunction restraining the respondents from excluding him from their track, a mandatory order requiring them to secure for him on their track a space where he could conveniently carry on bookmaking on days on which dog races were run and damages. After various interlocutory proceedings to which I need not refer, Oliver J., having already by way of preliminary judgment decided that the appellant had a right of action, on October 30, 1946, made an order whereby he declared that a certain area being part of the respondents' track was "space within the meaning of s. 11, sub-s. 2 (*b*), "of the Betting and Lotteries Act, 1934," and granted an injunction restraining the respondents, so long as a totalisator was being operated on the track, from excluding the appellant from the track by reason only of the fact that he proposed to carry on bookmaking thereon and further awarded him 150*l*. by way of damages. From this judgment the respondents appealed to the Court of Appeal (Lord Greene M.R.,

H. L. (E.)
1949
CUTLER
v.
WANDSWORTH
STADIUM
LD.
Lord Simonds.

Somervell L.J. and Singleton J.) which unanimously reversed it, holding that, even if the respondents had committed a breach of their statutory obligation in that they had not made available for the appellant a space on the track where he could conveniently carry on bookmaking, yet the appellant had not a cause of action against the respondents.

My Lords, in my opinion the judgment of the Court of Appeal was clearly right. It is, I think, true that it is often a difficult question whether, where a statutory obligation is placed on A., B. who conceives himself to be damnified by A.'s breach of it has a right of action against him. But on the present case I cannot entertain any doubt. I do not propose to try to formulate any rules by reference to which such a question can infallibly be answered. The only rule which in all circumstances is valid is that the answer must depend on a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted. But that there are indications which point with more or less force to the one answer or the other is clear from authorities which, even where they do not bind, will have great weight with the House. For instance, if a statutory duty is prescribed but no remedy by way of penalty or otherwise for its breach is imposed, it can be assumed that a right of civil action accrues to the person who is damnified by the breach. For, if it were not so, the statute would be but a pious aspiration. But "where "an Act" (I cite now from the judgment of Lord Tenterden C.J. in *Doe* v. *Bridges* (1)) "creates an obligation, and enforces "the performance in a specified manner, we take it to be a "general rule that performance cannot be enforced in any "other manner." This passage was cited with approval by the Earl of Halsbury L.C. in *Pasmore* v. *Oswaldtwistle Urban District Council* (2). But this general rule is subject to exceptions. It may be that, though a specific remedy is provided by the Act, yet the person injured has a personal right of action in addition. I cannot state that proposition more happily, or indeed more favourably to the appellant, than in the words of Lord Kinnear in *Black* v. *Fife Coal Co. Ld.* (3): "If the duty be established, I do not think there "is any serious question as to the civil liability. There is no "reasonable ground for maintaining that a proceeding by "way of penalty is the only remedy allowed by the statute.

(1) 1 B. & Ad. 847, 859.

(2) [1898] A. C. 387, 394.

(3) [1912] A. C. 149, 165.

"The principle explained by Lord Cairns in *Atkinson* v. "*Newcastle Waterworks Co.* (1) and by Lord Herschell in "*Cowley* v. *Newmarket Local Board* (2) solves the question. "We are to consider the scope and purpose of the statute "and in particular for whose benefit it is intended. Now "the object of the present statute is plain. It was intended "to compel mine owners to make due provision for the safety "of the men working in their mines, and the persons for whose "benefit all these rules are to be enforced are the persons "exposed to danger. But when a duty of this kind is imposed "for the benefit of particular persons, there arises at common "law a correlative right in those persons who may be injured "by its contravention." An earlier and a later example of the application of this principle will be found in *Groves* v. *Wimborne (Lord)* (3) and *Monk* v. *Warbey* (4), in the former of which cases the Act in question was described by A. L. Smith L.J. (5) as "a public Act passed in favour of the workers "in factories and workshops to compel their employers to "do certain things for their protection and benefit."

But, my Lords, beyond the single fact that the performance by the respondents of their statutory duty will redound to the advantage of certain bookmakers, of whom the appellant may be one, I see neither in this Act nor in its attendant circumstances any element which takes this case out of the general rule which I have taken from Lord Tenterden's judgment in *Doe* v. *Bridges* (6). It was argued that the rule had no application where the statutory remedy was by way of criminal proceedings for a penalty. But I see no ground for this distinction. The implication is, if anything, in the opposite direction. For the sanction of criminal proceedings emphasizes that this statutory obligation, like many others which the Act contains, is imposed for the public benefit and that the breach of it is a public not a private wrong. Then it was said that the obligation imposed by s. 11 on the occupier of a track was intended for the benefit of bookmakers and, to make this argument more cogent, it was contended that only ss. 11, 12, 13 and 14 of the Act together with ss. 29 and 30 need be looked at in order to get that purview of the Act which the authorities prescribe. From this I dissent. Part II may perhaps be ignored, but Part I and Part III must clearly be read as a whole. So reading it, I have no doubt that the primary intention of the Act was to regulate in certain respects the conduct of race tracks and in particular the conduct of betting operations thereon. If in consequence of those regulations being observed some bookmakers will be benefited, that does not mean that the Act was passed for the benefit of bookmakers in the sense in which it was said of a Factory Act that it was passed in favour of the workmen in factories. I agree with Somervell L.J. (1) that [where an Act regulates the way in which a place of amusement is to be managed, the interests of the public who resort to it may be expected to be the primary consideration of the legislature. If from the work of regulation any class of persons derives an advantage, that does not spring from the primary purpose and intention of the Act.]

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(1) (1877) 2 Ex D. 441, 448.
(2) [1892] A. C. 345, 352.
(3) [1898] 2 Q. B. 402.
(4) [1935] 1 K. B. 75.
(5) [1898] 2 Q. B. 402, 406.
(6) 1 B. & Ad. 847, 859.

Then it was urged that the penalty provided by the Act was inadequate—an argument which was of weight in such cases as *Groves* v. *Wimborne* (*Lord*) (2), but here has no validity. I see no ground for thinking that, if the respondents fail to observe their statutory duties, including those prescribed by s. 11, they will not be adequately penalized. On the contrary the penalties are severe and, further, conviction for an offence may lead to the disastrous result of the licence being revoked.

Further and weighty reasons, from which I do not dissent, were given by the learned Master of the Rolls and the other members of the court and will be given by some of your Lordships for thinking that the appellant had not established his right. I do not need to say more than that this appeal cannot succeed and move that it be dismissed with costs.

LORD DU PARCQ. My Lords, the question whether the imposition of a duty by a particular statute impliedly gives a right of action to a person injured by reason of a breach of that duty frequently demands the attention of legal practitioners and of the courts. In recent years it has arisen (to name a few instances) with reference to the Road Traffic Act, 1930, the Food and Drugs (Adulteration) Act, 1928, and orders made under the Locomotives Act, 1896. When the point is argued at the Bar the case of *Doe* v. *Bridges* (3), which was decided in 1831, is commonly taken as a starting-

(1) [1948] 1 K. B. 291, 307.
(2) [1898] 2 Q. B. 402.
(3) 1 B. & Ad. 847.

point, and for the last quarter of a century the debate has normally turned on the question whether the case before the court falls within the decision in *Groves* v. *Wimborne* (*Lord*) (1) or that in *Phillips* v. *Britannia Hygienic Laundry Co. Ld.* (2).

To a person unversed in the science or art of legislation it may well seem strange that Parliament has not by now made it a rule to state explicitly what its intention is in a matter which is often of no little importance, instead of leaving it to the courts to discover, by a careful examination and analysis of what is expressly said, what that intention may be supposed probably to be. There are no doubt reasons which inhibit the legislature from revealing its intention in plain words. I do not know, and must not speculate, what those reasons may be. I trust, however, that it will not be thought impertinent, in any sense of that word, to suggest respectfully that those who are responsible for framing legislation might consider whether the traditional practice, which obscures, if it does not conceal, the intention which Parliament has, or must be presumed to have, might not safely be abandoned. The questions which this traditional legislative reticence so often brings before the courts are sometimes difficult, but that raised by the present appeal seems to me, assisted as I have been by the convincing judgments of the Court of Appeal, to be comparatively simple. This being so, and as I understand that all those of your Lordships who heard the argument are in agreement with the Court of Appeal, I will confine my observations to a single point.

I agree with those who say, as was said by Stephen J. in *Vallance* v. *Falle* (3), that " the best way of finding out the " meaning of a statute is to read it and see what it means," and I do not regret, any more than I understand Lord Greene M.R. to regret, the fact that, as he said in the present case (4), so-called rules of construction " have fallen into some " disfavour." It must be recognized, however, that the courts have laid down, not indeed rigid rules, but principles which have been found to afford some guidance when it is sought to ascertain the intention of Parliament. In *Phillips* v. *Britannia Hygienic Laundry Co. Ld.* (5) Bankes L.J. cited a well-known passage from the speech of Lord Macnaghten

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(1) [1898] 2 Q. B. 402.

(2) [1923] 2 K. B. 832.

(3) (1884) 13 Q. B. D. 109, 112.

(4) [1948] 1 K. B. 291, 298.

(5) [1923] 2 K. B. 832, 838.

H. L. (E.)

1949

CUTLER
v.
WANDSWORTH
STADIUM
LD.

Lord du Parcq.

in *Pasmore* v. *Oswaldtwistle Urban District Council* (1), in which that noble and learned Lord, referred to the statement of Lord Tenterden in *Doe* v. *Bridges* (2), spoke of the "general rule" that "where an Act creates an obligation, and enforces "the performance in a specified manner . . . . that performance cannot be enforced in any other manner." "Whether "the general rule is to prevail," (said Lord Macnaghten) "or "an exception to the general rule is to be admitted, must "depend on the scope and language of the Act which creates "the obligation and on considerations of policy and convenience." In my opinion Bankes L.J. rightly applied this principle in *Phillips's* case (3). I do not agree with Mr. Pritt's submission that it is heretical to regard criminal proceedings which may be followed by fine and imprisonment as a "specified manner" of enforcing a duty. I think that it is both orthodox and right so to regard them.

Now, the law having been thus stated and, as I believe, correctly stated in the Court of Appeal in 1923, the Act with which your Lordships are at present concerned was passed eleven years later. During that intervening period the dictum of Lord Tenterden had, I think, been consistently followed in the sense in which it was understood by Bankes L.J. It is, therefore, legitimate to assume that those who were engaged in drafting the Betting and Lotteries Act, 1934, had in mind the principle of construction which had thus been laid down. It was not thought fit to break with tradition and to state explicitly in the Act whether or not an aggrieved bookmaker was to have a right of civil action, but Parliament must be taken to have known that if it preferred to avoid the crudity of a blunt statement and to leave its intention in that regard to be inferred by the courts, the "general rule" would prevail unless the "scope and language" of the Act established the exception. It cannot be supposed that the draftsman is blind to the principles which the courts have laid down for their own guidance when it becomes necessary for them to fill in such gaps as Parliament may choose to leave in its enactments. There is an inevitable interaction between the methods of parliamentary drafting and the principles of judicial interpretation. I do not find in the present case any indication that Parliament sought to manifest an intention that an exception to the general rule should be created. On the contrary, whether the question is approached with, or without, such guidance as principles of construction can afford, I am clearly of opinion, in agreement with the Court of Appeal, that the language of the Act points to the opposite conclusion. I would therefore dismiss this appeal.

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(1) [1898] A. C. 387, 397.

(2) 1 B. & Ad. 847, 859.

(3) [1923] 2 K. B. 832.

LORD NORMAND. My Lords, I find myself in close agreement with the judgments in the Court of Appeal. In particular I respectfully agree with the Master of the Rolls (1) that the proper approach to the case is to consider whether on a true construction of the statute as a whole a right of action by an individual aggrieved by the breach of one of the statutory duties ought to be implied. It would be superfluous for me to examine point by point the ground already covered by the judgments under review. But there are two topics on which, out of respect to the argument addressed to the House, I wish to add some observations.

The first question is whether the appellant has succeeded in showing that he is a member of a group of persons who have an interest and right to enforce the duty imposed on the respondents by s. 11, sub-s. 2. Obviously the duty operates in a general way in favour of bookmakers, and bookmakers have an interest to enforce it. But the appellant did not maintain that a right to enforce it is given indiscriminately to all bookmakers as defined in s. 20, sub-s. 1. It would indeed have been impossible, in view of the width of the definition, to maintain that every bookmaker within it has a right to compel by civil action the licensees of every racing track to take such steps as are necessary to secure that, so long as a totalisator is being lawfully operated on the track, there is available for him and other bookmakers space on the track where they can conveniently carry on bookmaking in connexion with dog races run on the track on that day. The claim put forward was that the members of the group of bookmakers who had been in regular attendance at each dog racing track when the Act came into force had an individual right to enforce the performance of the duty at that track. What was to happen when a new dog racing track was commenced after the passing of the Act, or whether new members of a group were to have the right, were questions left imperfectly clarified in the argument. But this at least is certain, that no ingenuity can wrest from the language of the Act an implied

(1) [1948] 1 K. B. 291, 298.

reference to these alleged groups as the beneficiaries of the statutory duty. If it had been the intention of the legislature to confer a right of action on the members of the several groups of bookmakers, one for each racing track, it would not have omitted all reference to the groups and to their right as associated with a particular track. The vagueness of the appellant's case at this point tells strongly against it.

Lord Normand.

The other matter with which I wish to deal concerns the penalties provided by the statute. If there is no penalty and no other special means of enforcement provided by the statute, it may be presumed that those who have an interest to enforce one of the statutory duties have an individual right of action. Otherwise the duty might never be performed. But if there is a penalty clause the right to a civil action must be established by a consideration of the scope and purpose of the statute as a whole. The inference that there is a concurrent right of civil action is easily drawn when the predominant purpose is manifestly the protection of a class of workmen by imposing on their employers the duty of taking special measures to secure their safety. The penalties provided by the Act apply when a breach of the duty occurs, but each workman has a right to sue for damages if he is injured in consequence of the breach. In *Black* v. *Fife Coal Co. Ld.* (1), Lord Kinnear was considering a statute of that type (the Coal Mines Regulation Act, 1887). He said: "There is no "reasonable ground for maintaining that a proceeding by way "of penalty is the only remedy allowed by the statute. The "principle explained by Lord Cairns in *Atkinson* v. *Newcastle* "*Waterworks Co.* (2), and by Lord Herschell in *Cowley* v. "*Newmarket Local Board* (3), solves the question. We are "to consider the scope and purpose of the statute, and in "particular for whose benefit it is intended. Now the object "of the present statute is plain. It was intended to compel "mineowners to make due provision for the safety of the men "working in their mines, and the persons for whose benefit "all these rules are to be enforced are the persons exposed "to danger. But when a duty of this kind is imposed for "the benefit of particular persons, there arises at common "law a correlative right in those persons who may be injured "by its contravention. Therefore I think it is quite impossible "to hold that the penalty clause detracts in any way from the

(1) [1912] A. C. 149, 165–6.
(2) 2 Ex D. 441, 447.
(3) [1892] A. C. 345, 352.

"prima facie right of the persons for whose benefit the statutory "enactment has been passed to enforce the civil liability." The present case, however, is concerned with a statute very different in scope, purpose and character from the Coal Mines Regulation Act.

I have already dealt with the uncertainty about the persons who are to benefit by s. 11, sub-s. 2. It has also to be noted that the statute has not the single general object of safeguarding the livelihood of bookmakers. Its objects are complex, as its title shows, and they include the regulation of racing tracks, the regulation of betting at racing tracks, the authorization of the establishment of totalisators at dog racing tracks, and the amendment of the law relating to lotteries and certain prize competitions. The overriding purpose is the benefit of the community, but there is also a general purpose to benefit the members of the public who attend racing tracks or take part in betting: the interest of bookmakers under s. 11 is incidental and is not one of the general purposes of the statute. The whole structure of the statute is less homogeneous than that of the Coal Mines Regulation Act and similar Acts, and this is reflected in the relevant penalty clause itself. Section 30 prescribes one scale of penalties for offences under ss. 1, 2, 3 and 11 and any section of Part II of the Act. These penalties are by no means negligible in themselves, for they authorize the courts to impose substantial fines and to imprison on conviction for a second or subsequent offence for a period which may be as much as six months. Their deterrent effect is, however, very much increased by the provisions of s. 29, under which a director or officer of a body corporate may be deemed guilty of an offence of which the body corporate is convicted, and still more by the power given in s. 7, sub-s. 1 (*b*) and s. 16, sub-s. 1 (*d*) to withhold or revoke the licence required for the operation of a racing track if the applicant or licensee has been convicted of a contravention of the provisions regulating racing tracks and betting on them. The penalties therefore are an unusually effective sanction for the enforcement of the sections of the Act to which they relate, and stand in no need of aid from civil proceedings. There is another consideration of some importance. A single scale of fines and imprisonment covers the breach not only of the duties under s. 11 but also of a number of other duties in the performance of which neither bookmakers nor any other group of persons have a particular interest. The duty under s. 11 is certainly not more important than some of these and it is fair to infer that that particular duty was not intended to have the additional sanction of civil liability. Lastly if civil proceedings at the instance of an individual bookmaker are competent, there is no provision that a judgment of the civil courts that s. 11, sub-s. 2, has been contravened may be a cause for withholding or forfeiting a licence; and it might result that bookmakers would always resort to civil proceedings and would never initiate criminal proceedings because it is contrary to their interest to have the number of racing tracks diminished. It is reasonably certain that that is not what the legislature intended. I would dismiss the appeal.

LORD MORTON OF HENRYTON. My Lords, I have had the privilege of reading in print the speeches which have just been delivered. I agree with them and I also agree with the suggestion made in the course of his speech by my noble and learned friend, Lord du Parcq. In these circumstances, I do not desire to add any observations of my own. I agree that this appeal should be dismissed.

LORD REID. My Lords, I need not restate the facts of this case and I shall not discuss the authorities. I think that this case can be decided without calling in aid any legal presumption. The case turns on the interpretation of the Betting and Lotteries Act, 1934, and in particular on s. 11, sub-s. 2, of that Act and I find it unnecessary to go beyond the words of the Act and the circumstances in which it was passed so far as these are relevant to be taken into account in determining the intention of the legislature. The appellant founded on these circumstances, and I shall state them as favourably to the appellant as I think they can be stated. The position before the Act was passed was that no bookmaker had any legal right to be admitted to any dog racing track or to be allowed to carry on his business there. But in fact occupiers of such tracks welcomed the presence of bookmakers: it was in their interest to do so. The growing prosperity of this form of entertainment largely arose from the fact that there were ample facilities for members of the public who resorted to these tracks to make bets there during the meetings. It was illegal before the Act was passed for a totalisator to be operated on a dog racing track and unless bookmakers were allowed to carry on business there it was practically impossible to provide the facilities for betting which attracted large numbers of people to the tracks.

One of the purposes of the Act was to authorize occupiers of these tracks to operate their own totalisators, and it was obvious that this would put into their hands a powerful and probably highly profitable new instrument. It is in evidence that the respondents' totalisator has earned for them in one year a gross profit of nearly 200,000*l.* Probably profits of this magnitude were not anticipated, but if even a moderate part of this profit was thought likely there was plainly need for regulation and the Act contains elaborate provisions for this purpose. In particular it must have been obvious that occupiers would no longer have the same interest to admit bookmakers. Indeed their interest might well be to exclude then or greatly to restrict their operations, because by doing so occupiers might well think that they could increase the volume of business of their totalisators and so increase their own profits. It must have been to avoid a situation of that kind that s. 11, sub-s. 2, was enacted. That sub-section enacts: "The occupier of a licensed track—(*a*) shall not, so "long as a totalisator is being lawfully operated on the track, "exclude any person from the track by reason only that he "proposes to carry on bookmaking on the track; and "(*b*) shall take such steps as are necessary to secure that, so "long as a totalisator is being lawfully operated on the track, "there is available for bookmakers space on the track where "they can conveniently carry on bookmaking in connexion "with dog races run on the track on that day; and every "person who contravenes, or fails to comply with, any of the "provisions of this sub-section shall be guilty of an offence." For whose benefit was this sub-section intended? The appellant's case is that it was primarily if not solely for the benefit of bookmakers. I do not think so. I think that it was primarily intended for the protection of those members of the public who might wish to bet on these tracks. Its effect is to prevent the totalisator from having a monopoly and to afford to the public such protection as can be given by making provision for competitive facilities for betting. I am prepared to assume in the appellant's favour that it may also have been an object of the legislature to give some protection to bookmakers (although this is by no means obvious) but it does not follow that to achieve such protection every individual bookmaker must have rights against the occupier of the track which he can enforce by civil action. Broadly speaking, the facilities which the Act requires for bookmakers are similar to the facilities which in fact they enjoyed before the Act was passed. I see no reason to infer from the Act read as a whole or from the circumstances founded on by the appellant that the enjoyment of these facilities required or was intended to have any further protection than that afforded by the track occupier's liability to prosecution if he failed to comply with the statutory provisions. But I think that the clearest indication of the intention of the legislature is to be found in the terms of s. 11, sub-s. 2, itself. I find it extremely difficult to reconcile the nature of the provisions of this sub-section with an intention to confer on individual bookmakers rights which each could enforce by civil action. If the legislature had intended to create such rights I would expect to find them capable of reasonably precise definition. But counsel for the appellant were unable to suggest such definition and I am equally unable to do so. At first sight s. 11, sub-s. 2 (*a*), might seem to confer on every bookmaker an unqualified right to demand admission. But counsel for the appellant admitted that this cannot be maintained. It cannot have been intended that the occupier must admit as many bookmakers as may present themselves on any occasion, whether there is room for them or not; and if an unreasonably large number seek admittance there is nothing in the Act to indicate who is to be admitted and who may be refused. This omission is not surprising if the obligation on the occupier is only a general obligation to admit an adequate number of bookmakers, but it is in my view a clear indication that no further obligation was intended to be imposed. If s. 11, sub-s. 2 (*a*), does not create any civil right in favour of individual bookmakers, I find it difficult to suppose that s. 11, sub-s. 2 (*b*), creates such a right. The occupier is required to take such steps as are necessary to secure "that there is available for bookmakers space on "the track where they can conveniently carry on bookmaking." This cannot mean that space must be provided on every occasion for as many bookmakers as wish to carry on business on that occasion: it cannot mean that after the allotted space is fully occupied an individual bookmaker who cannot find room there can demand further space where he can conveniently carry on business. The occupier must provide a space which

H. L. (E.)

1949

CUTLER v. WANDSWORTH STADIUM LD.

Lord Reid.

is adequate in all the circumstances and which is in a convenient situation. But if he does that he has fulfilled his statutory obligation. He is not required by anything in the Act to find a place for each bookmaker who presents himself. If the Act does not give to an individual bookmaker a right to demand a place for himself, I find nothing to suggest that it gives him any other right enforceable by civil action. The sanction of prosecution appears to me to be appropriate and sufficient for the general obligation imposed by the sub-section. I therefore agree that the appellant has no right to sue in respect of a breach by the respondents of their obligations under s. 11, sub-s. 2, of the Act and that the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Seifert, Sedley & Co.*
Solicitors for respondents: *Wilkinson, Howlett & Moorhouse.*

H. L. (E.)*

1949

Apr. 21, 22,
Apr. 8.

[HOUSE OF LORDS.]

MIDLETON (EARL) . . . . APPELLANT

AND

COTTESLOE (BARON) AND OTHERS . RESPONDENTS.

Revenue—Estate duty—Sale of land—Irish settlement—Capital money—Investments in England—Death of first tenant for life—Claims for estate duty by authorities in England and Eire—Settled Land Act, 1882 (45 *&* 46 *Vict. c.* 38), *s.* 22, *sub-s.* 5—*Finance Act,* 1894 (57 *&* 58 *Vict. c.* 30), *ss.* 1, 2, *sub-s.* 2—*Irish Free State Constitution Act,* 1922 (*sess.* 2) (13 *Geo.* 5, *c.* 1), *s.* 1, *sch. I., art.* 73.

Land comprised in an Irish settlement made in 1909, was sold and part of the proceeds of sale invested in English securities. On the death in 1942 of the first tenant for life, who was domiciled in England, estate duty was claimed in England but the Revenue authorities in Eire refused to give relief from estate duty there unless the validity of the English claim was upheld by the English courts. The trustees of the settlement took out a summons to have it decided whether estate duty was leviable in England on the English investments :—

**Present:* LORD SIMONDS, LORD DU PARCQ, LORD NORMAND, LORD MORTON OF HENRYTON and LORD REID.

H. L. (E.)

1949

MIDLETON (EARL) *v.* COTTESLOE (BARON).

Held, that estate duty was payable in England under s. 1 of the Finance Act, 1894, since s. 22, sub-s. 5, of the Settled Land Act, 1882, could not have the effect, for fiscal purposes, of converting the proceeds of sale from securities situate within the United Kingdom to land situate in Ireland.

Quære whether the Settled Land Act, 1882, which by virtue of the Irish Free State Constitution Act, 1922, sch. I., art. 72, remained in force in Eire, could, in any event, have extra-territorial operation so as to affect English investments.

Decision of the Court of Appeal (sub nom. *In re Midleton's Settlement, Cottesloe (Lord) and Loyd* v. *Attorney-General and Midleton (Earl)*) [1947] Ch. 583, affirmed.

In re Stoughton [1941] I. R. 166, disapproved.

APPEAL from the Court of Appeal (Lord Greene M.R., Cohen L.J. and Vaisey J).

The facts, stated by LORD SIMONDS, were as follows: By an indenture dated May 15, 1909, and made between the late Earl of Midleton of the first part, the appellant, the present Earl of Midleton, of the second part, the Right Honourable Madeleine Cecilia Carlyle Viscountess Midleton of the third part, and the Honourable Arthur Grenville Brodrick and the Honourable Thomas Francis Fremantle (now Lord Cottesloe) of the fourth part, certain mansion houses and lands at Midleton in the County of Cork and other lands and hereditaments in that part of Ireland which is now known as Eire over which the late Earl of Midleton and the appellant had a general power of appointment were appointed and settled to the use of the trustees thereof for a term of 1,500 years upon trust to raise a certain capital sum (which did not affect the investments now in question) and subject thereto upon trust that the said trustees might during the joint lives of the late Earl and the appellant receive a rent-charge of the amount (in an event which happened before the death of the late Earl) of 700*l*. per annum upon trusts thereby declared for the benefit of the appellant and subject thereto to the use of the late Earl during his life with remainder (subject to certain family charges) to uses under which the appellant was now tenant for life in possession (such life estate being determinable in the events therein mentioned) with remainders over. The respondents, the Right Honourable Thomas Francis Baron Cottesloe and Sir Henry Charles Loyd, were the present trustees of the settlement for the purposes of the Settled Land Acts, 1882–1890, having been appointed by a deed dated November 1, 1935. Since the date of the settlement and in the lifetime of the late Earl various sales of lands comprised in the settlement were effected both under the Settled Land Acts, 1882-1890, and under the Irish Land Purchase Acts. Parts of the proceeds of such sales were invested by the trustees of the settlement in the purchase in their names of inscribed or registered stocks or shares transferable in the books of the Bank of England or on registers kept in England. They were of an approximate value of 90,000*l*. The late Earl died on February 13, 1942, domiciled in England. The appellant was also then and still remained domiciled in England. On the death of the late Earl a conflict of opinion arose between the Revenue authorities of England and Eire respectively. The English authorities claimed estate duty on the investments as being property situate in England which had passed under the dispositions of the settlement on the death. The Eire authorities contended, on the other hand, that, having regard to the origin of the investments and the provisions of s. 22, sub-s. 5 of the Settled Land Act, 1882, the investments were for fiscal purposes to be treated as if they were lands situate in Eire and consequently they were not subject to English estate duty, and they refused relief under the Double Taxation (Relief) Order (No. 1) 1923, unless the claim of the English Revenue authorities should have been affirmed by the English court. Accordingly the respondent trustees issued an originating summons in the Chancery Division, to which the Attorney-General and the appellant, the present Earl, were defendants, to have it determined in the terms of the first question, whether on the death of the late Earl of Midleton, " estate duty became leviable under " the law of England on such part of the investments held " by the . . . . trustees . . . . as represented proceeds of " sale of or other capital moneys arising from lands in Eire " subject to the said settlement." The Court of Appeal, affirming Roxburgh J., held that the investments could not be considered to be Irish land by virtue of the Settled Land Act, 1882, s. 22, sub-s. 5, and that therefore estate duty was payable in England under s. 1 of the Finance Act, 1894. The present Earl of Midleton appealed to the House of Lords.

Upjohn K.C. and *Denys Buckley* for the appellant. This case is of general importance and affects others not before the House. The proper law of the settlement is, and always

H. L. (E.)

1949

MIDLETON (EARL) v. COTTESLOE (BARON).

has been, the law of that part of Ireland now called Eire, including s. 22, sub-s. 5 of the Settled Land Act, 1882: see also s. 65. This Act affects the operation and effect of the settlement, which must be considered in order to ascertain whether the English investments passed in 1942 for the purposes of the Finance Act, 1894: see s. 1 and s. 2, sub-s. 2, as amended by the Finance Act, 1936, s. 24. The Settled Land Act, 1882, s. 22, sub-s. 5 effects a statutory conversion of the English securities into land in Eire and that conversion is effective for fiscal purposes, including the purposes of estate duty. The Crown is bound by it. The relevant words are "shall, for all purposes of disposition, transmission and "devolution, be considered as land." These words are apt to cover a passing on a death, for "passing" means changing hands. "Transmission" is the widest word and here there has been a transmission from the late Earl to the present Earl, but reliance is placed on all the words. The sub-section is far too widely expressed to be confined to the beneficial interest: see the words "in the same manner "and for and on the same interests." If the English investments are subject to estate duty under the Finance Act, 1894, in respect of the death of the late Earl, they will not in fact go to the appellant "in the same manner" as "the "land wherefrom the money arises" (the money being represented by the English investments) would have gone, if that land had not been disposed of. The fiscal burden imposed on the "passing" of the property by the Finance Act, 1894, is an incident of "transmission" within s. 22, sub-s. 5 of the Settled Land Act, 1882. The authorities in the appellant's favour are *In re Cartwright* (1); *In re Cutcliffe's Will Trusts* (2); *In re Mackenzie* (3); *In re Stoughton* (4); *Duke of Marlborough* v. *Attorney-General* (5); and *Attorney-General* v. *Marquis of Ailesbury* (6). The House should follow *In re Stoughton* (4). Further the Act of 1882 is still operative as an Act of the Imperial Parliament in regard to the English investments. Till the Irish Free State Constitution Act, 1922, there was no difficulty because the Act of 1882 applied both to England and to Ireland, which was then part of the United Kingdom. But by art. 73 of the Constitution in the schedule to the Act of 1922 the Act of 1882 was to continue in force. Since by an

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(1) [1939] Ch. 90.
(2) [1940] Ch. 565.
(3) [1941] Ch. 69.
(4) [1941] I. R. 166, 181.
(5) [1945] Ch. 145.
(6) (1887) 12 App. Cas. 672, 687.

H. L. (E.)

1949

MIDLETON (EARL) *v.* COTTESLOE (BARON).

Act of the Imperial Parliament it was to continue in force it did so for all purposes and the question of extra-territoriality does not arise. By the Settled Land Act, 1925, s. 119 and sch. V., the Act of 1882 was repealed but the Act of 1925 was only dealing with England and Wales, and the Act of 1882 continues to apply to Eire as it originally did and the English courts ought to have regard to it as part of the proper law of the settlement. The position might be different if all legislation had been repealed by the Act of 1922 and it had been left to the Irish Parliament to re-enact what it wished. Here, however, there was no repeal. Alternatively, so far as the sales made before the coming into operation of the Act of 1922 were concerned, the proceeds should be treated as land and the rights accrued up to that time cannot be affected by subsequent legislation, since till then the rights of the parties were governed by the Act of 1882: see the Interpretation Act, 1889, s. 38, sub-s. 2.

Denys Buckley following. The Act of 1882 was taken into Irish law under art. 73 of the Constitution, and after that it was not open to the English Parliament to legislate to deal with land in the Irish Free State. Thereafter the question of the application of the Act rested with the Irish Parliament. Till the Act was repealed in England there was no doubt that the proceeds of sale were to be treated as land in Ireland. But even after that repeal there could still be capital moneys within the Act arising under Irish settlements of Irish land. There is no reason why the Act should not continue to operate with regard to that land, for the Act was only repealed so far as its operation in England and Wales was concerned, since the new Act of 1925, including repeals, was only expressed to have effect in England and Wales. As to the construction of s. 22, sub-s. 5 of the Act of 1882, matters of estate duty affect not only the manner in which property is held but also the "estates, interests and trusts" on which it is held. Estate duty is one of the purposes of transmission and devolution within the sub-section. [He referred to the Finance Act, 1894, s. 9.]

Sir Frank Soskice S.-G. and *J. H. Stamp* for the Attorney-General were not called on to argue.

Norman Armitage for the respondent trustees did not argue.

The House took time for consideration.

April 8. LORD SIMONDS. My Lords, this appeal raises a question which is said to be of general importance and to affect other cases than that which your Lordships have to consider. It concerns the right of the Crown to levy estate duty upon English investments which represent the proceeds of sale of Irish land settled by an admittedly Irish settlement. This right which has been established by the decision of Roxburgh J. and the Court of Appeal is challenged on this appeal.

Section 22, sub-s. 5 of the Settled Land Act, 1882, is in the following terms: " Capital money arising under this Act " while remaining uninvested or unapplied, and securities on " which an investment of any such capital money is made, " shall, for all purposes of disposition, transmission, and " devolution, be considered as land, and the same shall be " held for and go to the same persons successively, in the " same manner and for and on the same estates, interests, and " trusts, as the land wherefrom the money arises would, if " not disposed of, have been held and have gone under the " settlement." The Settled Land Act, 1882, has been repealed in toto by the Settled Land Act, 1925, which extends only to England and Wales, but it is still in force in Eire under circumstances which in another case may demand closer examination.

In order to succeed in his claim the appellant must, as it appears to me, establish two propositions (*a*) that the provisions of s. 22, sub-s. 5 of the Settled Land Act, 1882, are still operative as an Act of the Imperial Parliament in regard to English investments representing the proceeds of sale of Irish land and (*b*) that, being so operative, they have the effect for fiscal purposes of converting such proceeds from securities situate within the United Kingdom to land situate in Ireland. In my opinion the appellant fails to establish the second of these propositions, and it becomes unnecessary to determine the first of them.

On the secoud point on which I concur in, and can really add nothing to, the judgment of Lord Greene M.R., I see no reason why the words " including fiscal purposes " should be read into the section after the word " devolution." I refer to the necessity of reading such words into the section for it seems to me clear that by themselves the words " for " all purposes of disposition, transmission and devolution " do not naturally include a purpose which arises only under a taxing Act. Moreover, it appears to me that the context in which these words are to be found, viz., the following sentence, in which the beneficial interests of successors are dealt with, lends support to the view that it is only with the rights of beneficiaries in regard to disposition, transmission and devolution that the sub-section is dealing. It would, further, be an anomalous result if in a statute which does not profess to bind, and clearly does not bind, the Crown the words "for fiscal purposes" which vitally affect the Crown were by some implication to be read into the section. Learned counsel for the appellant, whose argument lacked nothing in clarity and cogency, urged on your Lordships that the fiscal burden which is imposed upon the "passing" of property by the Finance Act, 1894, is an incident of transmission and, further, that the provision that capital money is to be enjoyed "in the same manner" as "the land wherefrom the money "arises" indicates that it is to be subject to the same fiscal burden, but I hope I do not dismiss the argument too lightly if I say that the relevant words mean just what they say and no more and that there is no justification for implying other words which, more than most words, demand explicit expression. Reliance was placed on certain cases but (with one exception) they do not appear to me to support the appellant's contention. Neither in *In re Cartwright* (1), nor in *In re Cutcliffe's Will Trusts* (2), nor in *In re Mackenzie* (3), was the question now under consideration relevant, and I do not think it necessary to consider whether they were rightly decided. The exception to which I refer is the Irish case of *In re Stoughton* (4). Like the learned Master of the Rolls, I must regret that I cannot accept the view of the learned judges who decided that case, but it would seem from the report that they did not have the advantage of a full argument on the point.

The appellant failing to establish the second of his propositions, that is an end of the matter and I do not think it necessary to discuss the first proposition. Upon this too the decision of both Roxburgh J. and the Court of Appeal was adverse to him. It was conceded that, unless the Settled Land Act, 1882, is still in force, not only in Eire as an Act deriving its validity from art. 73 of the Constituent Act which is scheduled to the Irish Free State Constitution Act, 1922 (Session 2), but also in England as an Act of the Imperial Parliament,

(1) [1939] Ch. 90.
(2) [1940] Ch. 565.
(3) [1941] Ch. 69.
(4) [1941] I. R. 166.

it cannot have any operation in regard to English investments. I will say no more than that grave, if not overwhelming, difficulties appear to me to lie in the way of the contention that at any time since the Irish Free State Constitution Act, 1922 (Session 2), came into force any Act, which by art. 73 of the Constituent Act thereafter remained in force in Eire, could have any extra-territorial operation so as to affect English investments. But I do not think it necessary finally to decide a question which no doubt raises a nice constitutional problem.

I move that the appeal be dismissed with costs.

My Lords, my noble and learned friend Lord Reid, who is unable to be here to-day, has asked me to say that he concurs in the opinion which I have read.

LORD DU PARCQ: My Lords, I concur in the opinion which has been delivered and in the motion proposed.

LORD NORMAND: My Lords, I also concur.

LORD MORTON OF HENRYTON. My Lords, it is plain that question 1 of the originating summons must be answered in the affirmative if your Lordships come to the conclusion that the incidence of death duties is not one of the " purposes " of disposition, transmission and devolution " with which alone s. 22, sub-s. 5 of the Settled Land Act, 1882, is concerned. For my part, I do not doubt that this is the correct conclusion. The sub-section carefully limits the purposes for which capital money and investments thereof are to be considered as land, and in my view the appellant is really asking this House to give no effect to the limiting words " of disposition, transmission and devolution " no one of which aptly applies to the incidence of death duties.

I think that if the legislature had intended the sub-section to have any effect on questions of death duties, the words just quoted would have been omitted, or a fourth " purpose," referring expressly to death duties, would have been inserted. I need not further elaborate my reasons for thinking that the appeal fails on this first point, as I am in substantial agreement with the views expressed thereon by the Court of Appeal. As to the cases relied on by Mr. Upjohn, I do not think he can derive any real assistance from any of the observations of

H. L. (E.)

1949

MIDLETON (EARL) v. COTTESLOE (BARON).

Lord Morton of Henryton.

Lord Greene M.R. in *In re Cartwright* (1) or of myself in *In re Cutcliffe's Will Trusts* (2). These observations were not directed to any question of death duties. Nor can counsel rely upon the concession made by the Crown, in very special circumstances, in *Duke of Marlborough* v. *Attorney-General* (3) With all respect to Hanna J., I cannot accept as correct his observations as to the construction of s. 22, sub-s. 5, in *In re Stoughton* (4). It does not appear from the report that the learned judge had had the assistance of argument upon this point.

As the appellant fails upon this first and vital point, it is unnecessary to arrive at a conclusion on the other very ingenious arguments advanced by Mr. Upjohn and Mr. Buckley.

I concur in the motion proposed.

Appeal dismissed.

Solicitors for appellant and the respondent trustees: *Warrens.*

Solicitor for the Crown: *Solicitor of Inland Revenue.*

(1) [1939] Ch. 90.
(2) [1940] Ch. 565.
(3) [1945] Ch. 145.
(4) [1941] I. R. 166, 181 *fin.*

H. L. (E.)*

1949

Jan. 26, 27, 31; *Feb.* 1, 2; *Apr.* 8.

[HOUSE OF LORDS.]

GILMOUR . . . . . . APPELLANT

AND

COATS AND OTHERS . . . . . RESPONDENTS.

Charity—Charitable gift—Religious purpose—Declaration of trust—Trust for Roman Catholic convent—Cloistered and contemplative community.

By a declaration of trust a sum of money was to be held on trust, if the purposes of a certain Roman Catholic priory were charitable, to apply the income of the trust fund to all or any such purposes. The priory consisted of a community of cloistered nuns, who devoted their lives to prayer, contemplation, penance

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**Present*: LORD SIMONDS, LORD DU PARCQ, LORD NORMAND, LORD MORTON OF HENRYTON and LORD REID.

H. L. (E.)

1949

GILMOUR *v.* COATS.

and self-sanctification within their convent and engaged in no exterior works. There was evidence as to the doctrine of the Roman Catholic Church with regard to the benefit conferred by the contemplative life, not only on those who followed it themselves but also, through the efficacy of their intercessory prayers, on members of the public in bringing about their spiritual improvement, as well as by the example their life afforded of self-denial in order to attain greater love of God and union with Him.

Held, that the purposes of the priory were not charitable. The element of public benefit is essential to render a purpose charitable in law and this applies equally to religious as to other charities. The benefit of intercessory prayer to the public is not susceptible of legal proof and the court can only act on such proof. Further, the element of edification by example is too vague and intangible to satisfy the test of public benefit.

Cocks v. *Manners* (1871) L. R. 12 Eq. 574 approved.

Decision of the Court of Appeal (sub nom. *In re Coats' Trusts, Coats* v. *Gilmour*) [1948] Ch. 340, affirmed.

APPEAL from the Court of Appeal (Lord Greene M.R., Asquith and Evershed L.JJ.)

By a declaration of trust made on June 10, 1946, between the respondent, Evelyn Dudley Coats of the one part, and herself and George Bellord (therein called " the trustees ") of the other part, a sum of 500*l*. cash was settled upon trust after payment of costs, for investment as therein mentioned and to hold the resulting trust fund " upon trust " if the purposes of the Roman Catholic community situate " and known as the Carmelite Priory, St. Charles' Square, " Notting Hill, in the County of London, are charitable to " apply the income of the trust fund for all or any such purposes " . . . . but if the purposes of the said community are not " charitable then upon trust to apply the trust fund to all " or any of the purposes of the Converts' Aid Society, of " 20, Holmes Road, Twickenham, Middlesex." On October 31, 1946, an originating summons was issued in the Chancery Division to which the appellant, Ethel Gilmour, in her capacity as prioress of the priory, and certain persons representing the Converts' Aid Society, who were among the present respondents, were made defendants asking whether the trustees, then plaintiffs and now also respondents, ought to apply the trust fund to the purposes of the priory or of the Converts' Aid Society. The appellant made the following affidavit: " (1.) I am prioress of the Carmelite Priory, St. Charles' Square, " Notting Hill, in the County of London (hereinafter called " ' the convent ') which is one of the communities of the

" Discalced Nuns of the Order of Our Blessed Lady of Mount " Carmel. The Discalced Friars and Nuns have been a " separate branch of the Order under the jurisdiction of their " own Father General . . . . since the General Chapter of " the whole Order which was held at Cremona in the year 1593. " The Discalced Nuns and Friars were founded by St. Teresa " of Avila with the object of restoring the strict enclosure " and intensifying the contemplative life of the communities " and promoting their share in the apostolate. The first " convent of nuns was founded by her at Avila on August 24, " 1562. (2.) The convent was founded in the year 1878 . . . . " from the Covent of the Incarnation at Paris. From the " convent 33 other convents have been founded in England, " Wales and Scotland . . . . (3.) The Discalced Carmelite " Nuns throughout the world follow the Primitive Rule, " which was drawn up by St. Albert Patriarch of Jerusalem " and confirmed by Pope Innocent IV in 1247, and the Con-" stitutions of 1591 as modified in 1926 to bring them into " conformity with the new code of Canon Law of the Roman " Catholic Church. (4.) Each Carmelite convent consists of " not more than 20 or . . . . 21 nuns, who live in community " presided over by a prioress. . . . The convents in any " one country are not grouped under the jurisdiction of a " Provincial, but each convent is autonomous and all are " subject under the Constitutions to the jurisdiction of the " General of the Discalced Carmelite Friars or of the local " Bishop. (5.) The purposes of the Discalced Carmelite Nuns " are conveniently summarized in the prologue to the Con-" stitutions of the Discalced Carmelite Friars which states " that ' two vocations in their due order have been divinely " ' ordained. The more important aim of our life shall be " ' the love and contemplation of divine things and the " ' secondary aim the apostolate, particularly all that pertains " ' to our neighbours' salvation.' (6.) The way of life and " practices which are followed . . . . are laid down . . . . in " our Constitutions and the relevant provisions of the Canon " Law . . . . which work out the implications and applica-" tions of the simple but perpetual vows of poverty, chastity " and obedience which we take . . . . and which impose " and regulate the strict enclosure and the observance of " silence which are the conditions of the true and fruitful " following of the contemplative life. They also prescribe " the occupations which are to fill our lives prescribing that

" we are to assist devoutly and every day at the celebration " of Mass and the recital of the Divine Office and other offices " and prayers of the Church, that we are to spend so many " hours a day in mental prayer, which with our other spiritual " exercises are offered with general or special intentions in " furtherance of our aims, and that we are never to be idle " but are to spend all our time that is not occupied in community duties engaged in prayer or spiritual reading or " work in our cells. Lastly, they prescribe practices to " further the spirit of humility and particular mortifications " . . . . by, for example, enjoining on us the monastic fast " lasting from September 14 to Easter . . . . and by providing " that we shall live our lives without those aids to comfort " which in these days are regarded not so much as luxuries " as necessities of life." His Eminence Cardinal Griffin, the Roman Catholic Archbishop of Westminster, made the following affidavit : " (1.) The Discalced Nuns of the Order of " Our Blessed Lady of Mount Carmel belong to one of the " Orders of the Roman Catholic Church which are called " contemplative Orders. They are so called because their " members are strictly enclosed in their convents and engage " in no exterior works but devote their lives to contemplation " and penance, contemplation including not only assisting at " Mass and reciting the Divine Office and other vocal prayers " but also reflection of the mind on God and the things of " God which evokes from the will or heart acts of adoration, " propitiation, love and intercession towards God, and which " in the case of contemplatives as a general rule passes sooner " or later and to a less or greater degree into mystical prayer. " (2.) The contemplative Orders are so called to distinguish them " from what are called the active Orders . . . . the members " of which engage in exterior works such as teaching, nursing " the sick, tending the poor . . . . (3.) The purpose of " a Catholic woman in joining a contemplative Order . . . . is " to promote in herself more fully and perfectly the love of " God expressed in as perfect a submission to His Will as she " can achieve with the aid of His Grace, to promote that love " in her neighbour and to make reparation to God for the sins " of mankind ; and she joins a contemplative Order for that " purpose because it is the teaching of the Church that the " religious life, as it is called, is the state of perfection . . . . " (4.) In the case of the Discalced Nuns of the Carmelite Order " who follow the Primitive Rule of the Order and Constitutions

H. L. (E.)

1949

Gilmour v. Coats.

"which were originally drawn up by St. Teresa of Avila, "but which do not summarize the purpose of their life, that "purpose is admirably summarized in the prologue to the "Constitutions of the Discalced Friars of the Order which "provide that 'two vocations in their due order have been "'divinely ordained. The more important aim of our life "'shall be the love and contemplation of divine things and "'the secondary aim the apostolate, particularly all that "'pertains to our neighbours' salvation.' It is evident from "this . . . . that though the Discalced Nuns do not engage "in exterior works for the benefit of their neighbour it would "be an incomplete statement of their purpose to say that it "is merely the working out of their own salvation . . . . "(5.) This becomes the more apparent when one considers the "teaching of the Church on the effect of the fulfilment of their "purpose on the advancement of religion among those outside "their convents. . . . It is the teaching of the Church that "none of its members leads a life which is isolated from the "lives of his fellow members . . . . but that . . . . all "Christians as members . . . . of Christ's mystical body, "the Church, are one with Christ and with one another. The "present Pope . . . . reiterates in his Encyclical Letter "'Mystici Corporis Christi,' the teaching of the Church that "the ministries of Christ's body, the Church, include not only "persons in sacred Orders but also all those who have embraced "the evangelical counsels and lead either an active life among "men, or a hidden life in the cloister, or else continue to "combine the two, according to the institution to which they "belong . . . .; that the salvation of many souls depends "on the prayers and voluntary mortifications offered for that "intention by the members of the mystical body of Jesus "Christ, and that though public prayer exceeds any other, "nevertheless all prayers, even those said in the most private "way, have their dignity and their efficacy . . . . (6.) Further "it is the teaching of the Church that no person can enter "into eternal life in Heaven unless when he dies he possesses "that life which is additional to and above his natural life "and is . . . . called supernatural life . . . . It is also the "teaching of the Church that this life and the supernatural "assistance of graces which enable a person to obtain and "preserve and develop it and to recover it if it is lost by "the rejection of God are His free gifts which He can give "without the intervention of any man but which . . . . He

" has ordained that He will give in response to the prayers and " mortifications of the members of the Church for their neighbours, both inside and outside the Church. It is in view of " these truths that the daily prayers and mortifications which " the Carmelite Nuns . . . . offer for their neighbour, both " inside and outside the Church advance religion and are of " inestimable spiritual benefit to their neighbour bringing " to those who are ignorant of them or have rejected them the " gifts of God and the graces to obtain them and bringing to " those who possess His gifts the graces of perseverance and " progress in the supernatural life . . . . Moreover, it is " the teaching of the Church that the prayers and mortifications " of the contemplative and practising religious are especially " efficacious in view of the high degree of union with God " which results from the following of their vocation. (7.) Lastly, " it is an undoubted fact that the practice of the religious life " of the Carmelite Nuns and other religious is a source of great " edification to other Catholics—and indeed, in innumerable " cases to non-Catholics—leading them to a higher estimation " of spiritual things and to a greater striving after their own " spiritual perfection and that the knowledge that there are " men and women who are prepared to sacrifice all that the " worldly man holds dear in order to attain a greater love of " God and union with Him inculcates in them a greater estimation of the value and importance of the things which are " eternal than they would have if they had not these examples " before them." The teaching of the Church was similarly expressed in the Apostolic Constitution " Umbratilem," on the power of contemplation, produced in evidence. The Court of Appeal dismissed an appeal from Jenkins J., who in effect declared the purposes of the Carmelite Priory not to be " charitable " in the technical sense which the law ascribes to that word. The appellant appealed to the House of Lords. The respondent trustees did not appear.

Russell K.C. and *Hewins* for the appellant. The question in the originating summons was framed with the intention of raising the issue whether the purposes of the convent of contemplative nuns are charitable; the settlement was made for that purpose. The decisions of the courts below were wrong on three grounds: (*a*) The advancement of religion is a recognized head of charity and the objects of this convent are religious. It is conceded that in every branch of charity it is necessary to find an element of public benefit or utility, and here the religious activities of the nuns are all directed to the spiritual benefit of all the members of the community and the advancement of religion. The fact that the benefit is spiritual is immaterial; the purposes of the convent involve public benefit. It has been objected that the benefit to the community is not susceptible of proof in the ordinary sense and that therefore it is not the type of benefit regarded in the law of charitable trusts, since one cannot prove the effect of the nuns' activities on the religious life of persons outside their convent. The objection is unjustified on principle and authority. A charitable purpose of a religious nature is necessarily sui generis. The law accepts and assumes that religion is beneficial at least to the person practising it; but one cannot stop short of the effect religious practices have by the operation of Almighty God. One cannot stop short in the mind of the person praying and disregard the fundamental basis of religion that it involves intercession and answer to prayer. It necessarily follows from the acceptance by the law of the benefit of religion that it also accepts the intercessory value and effect of prayer. The purposes of the convent in interceding for the whole human race are charitable purposes for the advancement of religion among the public. It was said in *Cocks* v. *Manners* (1) that contemplative religious existed only for the purposes of their own sanctification but that was a misapprehension. They pray for others and the public can be benefited in a religious way by their prayers. (*b*) The second ground is that alternatively the edification or good example, proved as a fact in the evidence as being afforded to the Roman Catholic section of the public, by the existence of the way of life of the convent and its inmates, turns their minds to spiritual matters and benefits the public by advancing religion among them. (*c*) The third ground is that the result and the function of such a trust as this is to endow the convent. The kind of religious life followed by the nuns and regarded at least among Roman Catholics as the highest kind can only be followed in the cloister with the appropriate facilities. Admission to the convent is open to that section of the public, thus affording Roman Catholics the opportunity to live the fullest and most intense religious life. There is a parallel with an endowment for students pursuing higher education. Though there might be only six

(1) (1871) L. R. 12 Eq. 574.

students, the smallness of their number would not render it the less a valid benefit to the community. There is an analogy between the higher education and the higher religious life.

O'Hanlon v. *Logue* (1) establishes a principle which, if carried to its logical conclusion includes this convent. It shows that it is accepted law in Ireland that the Irish statute 10, Car. 1, sess. 3, c. 1, is to be interpreted according to the same principles as the English Statute of Charities, 43 Eliz. c. 4, and that the purposes of such a convent as this are charitable, the element of public benefit resting on (*a*) the intercessory value of prayers said in private and (*b*) the fact that the court cannot question that value. This is good law in England, although the passage cited in argument in that case (2) from *In re Cranston, Webb* v. *Oldfield* (3) goes too far in making the test of public benefit the belief of the founder of the alleged charity. The true principle is that in such a case as the present it must be accepted that the purposes of the convent do, in fact, have the beneficial results intended because (*a*) the benefit to the public of the belief in and practice of religion is of its very nature not susceptible of forensic proof; (*b*) the evidence establishes the especial benefit to the human race of the intercessory life of the convent; (*c*) the beliefs of a recognized and established Christian Church, of such magnitude and importance in the spiritual life of this country as the Roman Catholic Church, as to the benefits resulting to the human race from the execution of the purposes of the convent must be accepted as conclusively establishing benefit to the public, in default of evidence establishing either counterbalancing detriment or conflict with the laws of this country; (*d*) there is no such counterbalancing detriment or conflict involved in the execution of those purposes. The present case is distinguishable from *Cocks* v. *Manners* (4) inasmuch as there has never before been before the court evidence of the benefit derived from intercessory prayer and edification. The reason for that decision was that in default of full evidence as to the objects of the convent, it appeared that its inmates alone were to be benefited. Other relevant authorities are *In re Caus* (5); *Nelan* v. *Downes* (6); *In re Maguire* (7);

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(1) [1906] 1 I. R. 247, 261–2, 268, 279.
(2) Ibid. 252.
(3) [1898] 1 I. R. 431, 446–7.
(4) L. R. 12 Eq. 574.
(5) [1934] Ch. 162.
(6) (1917) 23 C. L. R. 547.
(7) [1943] I. R. 238.

In re Michel's Trusts (1); *In re Joy* (2); *In re White* (3); *In re Macduff* (4); *In re Delany* (5); *Dunne* v. *Byrne* (6); *Chesterman* v. *Federal Commissioner of Taxation* (7); *In re Williams* (8); *In re Barclay* (9); *Munster & Leinster Bank Ld.* v. *Attorney-General* (10); *In re Keogh* (11); *In re Howley* (12); *National Anti-Vivisection Society* v. *Inland Revenue Commissioners* (13); *Hoare* v. *Hoare* (14); *In re Hummeltenberg* (15), and *Bourne* v. *Keane* (16). It has been suggested that the court can only consider spiritual benefits which are apparent to it and that, in this case, the only apparent benefits are those enjoyed by the nuns, so that the appellant has failed to establish by normal proof that the public is benefited at all, such proof being requisite under every head of charity. But mundane evidence is not requisite under the religious head of charity because the very inclusion of religion in the heading of charities involves the acceptance that the practice of religion is beneficial, that prayers are answered and that spiritual benefits are thereby conferred. In considering religious matters the court thus accepts belief rather than mundane evidence; it accepts the unprovable as true. All the heads of charity are objects likely to be beneficial and in its very origin the inclusion of religion departs from the merely mundane, since it is recognized that its benefits are supernatural. The law never said that religion is beneficial because a person of a religious turn of mind is less likely to commit crime or lapse from civic docility. Religion was included for its spiritual and not for its civic benefits. It was not included simply because it tends to make good citizens; that is on the purely ethical level. Gifts to pious uses were gifts to God and were supported not because they were going to induce people to behave better civically, but because they were designed to assist the community to live the supernatural life, to fulfil the duty of all mankind to God, "to "know Him, love Him and serve Him in this world and to be "happy with Him for ever in the next." Prayer is the raising up of the mind and heart to God but never without the assumption of an intercessory effect. Religion is a spiritual tie or bond with God obtaining benefits for man which he cannot bestow on himself. Any other conception of religion and prayer would debase it to mere auto-suggestion. A trust is for the advancement of religion if it is for the promotion of prayer for spiritual benefits but not if it is for the promotion of prayer for temporal benefits. With reference to *In re Hummeltenberg* (1) the appellant relies on the point of supervision by the court. In this case supervision is possible. It is easier to supervise the life of a convent than, say, the execution of an educational trust at Oxford, because the lives of the nuns are so much more minutely regulated than life in a college. The appellant does not necessarily ask that *Hoare* v. *Hoare* (2) be overruled, since in that case there was no evidence as to the nature of the services held in the chapel. A convent is in a different position from an ordinary private chapel, because its very function is to pray for the community. *Dunne* v. *Byrne* (3) is not against the appellant because the Judicial Committee did not have to consider this particular point. In *Bourne* v. *Keane* (4) there was nothing to decide whether or not there was there a valid charitable bequest. What was said is that case as to the overruling of old authorities applies here. Finally the fact that the nuns also perform private self-sanctification does not affect their tangible function of benefiting the public by the advancement of religion, since they cannot advance the charitable purpose without also advancing the non-charitable purpose. Their purpose, though it involves self-sanctification also, is the advancement of religion among the public because the grace of God is called down on the public in answer to prayer. Prayers for temporal benefits may not be answered but those for spiritual benefits inevitably are. If a gift to a community of nuns is charitable because they benefit the public by teaching and good works, the same applies to a benefit to the public by intercessory prayer.

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(1) (1860) 28 Beav. 39.
(2) (1889) 60 L. T. 175.
(3) [1893] 2 Ch. 41, 46.
(4) [1896] 2 Ch. 451, 474.
(5) [1902] 2 Ch. 642.
(6) [1912] A. C. 407.
(7) [1926] A. C. 128.
(8) [1927] 2 Ch. 283.
(9) [1929] 2 Ch. 173, 181, 190.
(10) [1940] I. R. 19, 27, 29, 30, 33, 39.
(11) [1945] I. R. 13.
(12) [1940] I. R. 109.
(13) [1948] A. C. 31, 63.
(14) (1887) 56 L. T. 147.
(15) [1923] 1 Ch. 237, 239.
(16) [1919] A. C. 815.

As to the edification of the public, it is a question of degree whether in any case the public benefit is too remote. Here it is not too remote. Here there is something tending indirectly towards the edification of the public: see Wickens V.-C. in *Cocks* v. *Manners* (5). Edification means "a building up

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(1) [1923] 1 Ch. 237, 241.
(2) 56 L. T. 147.
(3) [1912] A. C. 407.
(4) [1919] A. C. 815.
(5) L. R. 12 Eq. 574, 585.

"in faith and holiness of life": see Shorter Oxford English Dictionary. That is different from instruction and that is the sense in which Wickens V.-C. understood it. It is also defined as "mental or moral improvement," but that is secondary. This charity is valid for its edificative effect, although this was not mentioned in the trust deed; it is in fact endowing a source of edification to the public.

As to the final point, this was not argued in the courts below but since this is a test case the House should consider it. By analogy to an educational trust, there is no distinction in principle between endowments of students during higher education involving the selection of beneficiaries from the public or a section of the public (which are in law charitable on educational grounds and not on grounds of poverty) and endowments such as the present one. To provide financial aid for the education of one's own family is not a valid charitable trust because it is only open to that family class: *In re Compton* (1); but a fund may be created in perpetuity to provide opportunity for study for twenty students to be selected from time to time from among applicants drawn from the public. That is beneficial to the public because it is open to the public and the selection is not limited to a narrow class; the opportunity for higher education among the public is thereby increased. It would be a good charity to found a scholarship for one boy to be selected from time to time from among the sons of officers of the Highland Brigade. It would be a good charity, not because of any benefit to particular members of the public, but because it advanced education as such; it contributed to the pool of education available to the public. Among Catholics the contemplative life is regarded as the highest form of life. The qualification for entrance to this community is not limited to any private group; any Catholic woman may be accepted if she has a vocation to that life. The lives of the nuns are wholly devoted, to a degree not possible outside the cloister, to those habits of mind and activities which are the essence of the concept of religion, namely, the contemplation and adoration of God, the consideration of all divine things and the offering of prayers and penances to God. To practice religion is recognized by the law to be a good thing and therefore to practice it all one's life to the exclusion of everything else must be a better thing.

Hewins following. The question whether a religious trust is for the public benefit cannot be determined by the belief of the creator of the trust. The court is not asked to accept from the Church that intercessory prayer benefits the public. What it is asked to accept is the effect of intercessory prayer, and on that the court must decide whether the trust is for the public benefit. The consequences of rejecting the principle which the court is asked to accept is that in the sphere of religious charities the law would become wholly unrealistic. It would accept no benefit that did not result from the impact of man on man, no benefit that could not be apprehended by the senses. It would omit from consideration that which is the essence of religion. It would result that the only benefit of which the court could take account would be a purely human benefit. Thus the court would be professing to deal with a kind of religion that does not exist and has nowhere existed. If one disregards God and the effect of God on man, any kind of stump worship, provided it was carried on in public, might be held to be charitable. If the appellant's principle were rejected the court would be discriminating, not in intention but in fact, between different religions. Catholic belief holds the prayers of the contemplatives to be the condition of the fruitfulness of the labours of the working preachers, and the court would be excluding from the category of charity one very important aspect of the work of the Church. Nowhere has the court laid down that the benefit to the public of religious charities must be of any particular kind or must be proved in any particular way. The court should not reject the appellant's principle unless it is so compelled, for this rejection would be out of harmony with the subject matter. The principle is that when the court is considering whether any institution or activity of an established and recognized religion is legally charitable and whether that institution or activity benefits the public, it will attribute thereto the spiritual effects which it has according to the beliefs of that religion. This was accepted in *O'Hanlon* v. *Logue* (1) and *In re Caus* (2). The argument derived from the suggestion that the endowment of a hermit could not be charitable is a "red herring." It is met by the principle requiring the supervision of the court. The element of impermanence in the hermit would also almost certainly lead to his rejection by the court. He is a complete free-lance, an individual bound by no vows or laws, and the court could

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(1) [1945] Ch. 123.

(1) [1906] 1 I. R. 247.

(2) [1934] Ch. 162.

justly say that if a gift for his support were held valid there would be no security that he might not cease to be a hermit next day. It is almost inconceivable that the court should regard him as a fit subject for a charitable gift. The question is hypothetical and probably could never arise, since hermits belong to a past age. In the present case, however, there is a permanent institution which can be supervised by the court. As to the point that the practice of religion can be accepted as charitable because it improves the conduct of people in the world, that would not be universally accepted. It would certainly not be accepted by Communism with its background of Hegelian philosophy. Religion is only held charitable on the basis of religious belief. As to edification, the life of the contemplatives is of value to the Church in its teaching office, affording examples of people who are living what the preachers are teaching.

Gray K.C. and *Humphrey King* for the respondents. In the Statute of Elizabeth the preamble provides an index of the sort of thing the law regards as charitable. These objects have been classified under four heads in *Morice* v. *Bishop of Durham* (1): see *Commissioners for Special Purposes of the Income Tax* v. *Pemsel* (2). Whichever of the four classes the court is dealing with, the element of public utility must be shown, viz., a tendency to benefit the public or a section of the public. Religion by itself is not charitable any more than education by itself. In the case of a religious charity it must always be found that its purposes tend to the instruction or edification of the public. It is a question of degree whether the benefit is too remote and some degree of instruction or edification does not necessarily make a trust charitable. As to intercessory prayer that is not necessarily for the public benefit in the sense of being beneficial to the public, including those who are not praying. It is not shown that shutting one's self up to pray for other people confers a public benefit. The law goes no further than to say that there is a God and that prayer to Him may be effective; it says that religion is good for man and includes prayer, regarding prayer as an attitude towards God. To show that the prayers of others are beneficial to those who do not pray is a matter which would require evidence. It is not a question of the efficacy of prayer but of its actual effect. In *Charitable Donations and Bequests Commissioners* v. *M'Cartan* (3) and *Munster &*

(1) (1805) 10 Ves. 521, 531.
(2) [1891] A. C. 531, 583.
(3) [1917] 1 I. R. 388.

Leinster Bank Ld. v. *Attorney-General* (1), it was held that proof of actual public benefit is necessary: see also *National Anti-Vivisection Society* v. *Inland Revenue Commissioners* (2) and *In re Grove-Grady* (3). Here there is proof of the belief of the Roman Catholic Church that intercessory prayer produces a public benefit and the court is asked to assume it as a fact because it is an article of faith of that Church. That goes further than the previous authorities and is without legal foundation. Such proof is not enough and the decision in *O'Hanlon* v. *Logue* (4) is based on the error of taking as true the faith of the donor. In the present case, therefore, there is no evidence to show that the gift to this convent has any element of public benefit or that it is a ministerial agency in carrying out the official work of the Roman Catholic Church. It is different from the case of a gift for the celebration of Mass, whether in public or in private, which is charitable because it is the chief rite of the Church and also because it provides an endowment for priests. Proof of public benefit arising therefrom is generally accepted. *Cocks* v. *Manners* (5) is a decision both on the facts and on principle. It is correct and would have been similarly decided had the facts now presented been before the court then. As to edification, the evidence of the Cardinal is proof not of fact but of opinion. Even taken as proof of fact, it does not show sufficient benefit to the public to support it as a good gift for charitable purposes. The alleged benefit is too indirect. The edification produced by having the example of contemplatives pointed out to one by a preacher or missionary is too remote. As to the final point suggested for the appellant, if it has any substance it is strange that it was never taken before in this or any previous case. It really begs the question. One must first decide on the main point whether this gift is beneficial to the public or not. If it is beneficial this third point is unnecessary; if it is not beneficial it must fail.

Humphrey King following. The element of public benefit in the case of a religious charity is considered by Lord Macnaghten in *Commissioners for Special Purposes of the Income Tax* v. *Pemsel* (6). It is the advancement of religion in the promotion of the practice of religion in public. The effect of intercessory prayer is not disputed but its effect on the

(1) [1940] I. R. 19.
(2) [1948] A. C. 31.
(3) [1929] 1 Ch. 557, 582.
(4) [1906] 1 I. R. 247.
(5) L. R. 12 Eq. 574.
(6) [1891] A. C. 531, 583.

public is imponderable and cannot be weighed in the scales of justice. If this gift were held good, all gifts for the private practice of religion would be charitable, e.g., such gifts as that in *Hoare* v. *Hoare* (1). This gift is endowing not the public practice of religion but simply a body of persons who pray.

Russell K.C. in reply. The practice of the contemplatives represents the highest form of prayer. Once it is granted that it is good for the individual to indulge in religious practice, it cannot be limited by saying that it is good for him to pray once a year or once a week, but not oftener. Prayers to be beneficial to religion need not be said in church and may be said in private. As to edification, in order to prove it, it is not necessary to file thousands of affidavits by persons who have been edified. No one has a better opportunity to speak with knowledge on this point than the Cardinal. The public is edified by the teaching of the preachers, and convents such as this provide the preachers with their material. As to the basis of the conception of charity in the Statute of Elizabeth, see *Maguire* v. *Attorney-General* (2). If the appellant's hypothesis be rejected it rests religion on auto-suggestion, so that if a particular sect worshipped a tree stump as a god that they thought could influence their lives that would be enough to qualify the public worship of the stump as a charitable activity, instead of a mere superstition. That is the logical result of leaving the supernatural element in religion out of consideration and looking only at the civic effects of religion, for if the law ignores that there is no reason for stopping short at monotheistic theism. As to the position of religion in the law of England, no statement has gone beyond Lord Parker's in *Bowman* v. *Secular Society Ld.* (3).

THE HOUSE took time for consideration

April 8. LORD SIMONDS. My Lords, by a declaration of trust made on June 10, 1946, between the respondent, Evelyn Dudley Coats of the one part, and herself and the respondent, George Bellord (therein called " the trustees ") of the other part, the sum of 500*l.* was settled upon trust for investment and to hold the resulting trust fund " upon " trust if the purposes of the Roman Catholic community " situate and known as the Carmelite Priory, St. Charles'

(1) 56 L. T. 147.
(2) [1943] I. R. 238, 250.
(3) [1917] A. C. 406.

" Square, Notting Hill, in the County of London, are charitable " to apply the income of the trust fund for all or any such " purposes . . . . but if the purposes of the said community " are not charitable, then upon trust to apply the trust fund " to all or any of the purposes of the Converts' Aid Society, of " 20 Holmes Road, Twickenham, Middlesex." On October 31, 1946, an originating summons was issued in the Chancery Division by the trustees, to which the present appellant and certain persons representing the Converts' Aid Society, who are among the present respondents, were made defendants, asking how the trustees ought to apply the income of the trust fund. The question, though framed in this general way, was intended to raise the issue whether the purposes of the Carmelite Priory were charitable. For it was clear that the settlement created a perpetuity in favour of that community, so that, if the purposes were not charitable, the gift over in favour of the Converts' Aid Society would take effect. [His Lordship then set out the relevant facts.]

It is the established belief of the Roman Catholic Church, as appears from the Apostolic Constitution " Umbratilem," that the prayers and other spiritual penances and exercises, in which the nuns engage for the benefit of the public, in fact benefit the public by drawing down upon them grace from God, which enables those who are not yet Christians to embrace the Christian religion and those who are already Christians to practice Christianity more fully and fruitfully, and, further that the prayers and other spiritual exercises of the nuns are the more efficacious by virtue of the fact that they devote their lives with especial devotion to the service of God. It is this benefit to all the world, arising from the value of their intercessory prayers, that the appellant puts in the forefront of her case in urging the charitable purpose of the trust.

Nor is it only on the intercessory value of prayer that the appellant relies for the element of public benefit in their lives. For it is the evidence of Cardinal Griffin—and I do not pause to ask whether it is evidence of fact or opinion—that the practice of the religious life by the Carmelite nuns and other religious is a source of great edification to other Catholics—and indeed in innumerable cases to non-Catholics—leading them to a higher estimation of spiritual things and to a greater striving after their own spiritual perfection and that the knowledge that there are men and women who are prepared to sacrifice all that the worldly in man holds dear in order to attain a greater love of God and union with Him inculcates in them a greater estimation of the value and importance of the things which are eternal than they would have if they had not these examples before them. Here then is the second element of public benefit on which the appellant relies, the edification of a wider public by the example of lives devoted to prayer.

I will reserve for final consideration an argument which was not urged in the courts below; that the trusts declared by the settlement are beneficial to the public, in that qualification for admission to the community is not limited to any private group of persons but any person being a female Roman Catholic may be accepted, and therefore those trusts provide facilities for the intensified and most complete practice of religion by those members of the public who have a vocation for it. Your Lordships were reluctant to listen to an argument on which you have not the advantage of the opinions of the learned judges in the courts below, but in the special circumstances of this case thought fit to admit it.

I turn then to the question whether, apart from this final consideration, the appellant has established that there is in the trusts which govern this community the element of public benefit which is the necessary condition of legal charity. If now for the first time the necessity for determining that question arose, it might be a more difficult one to answer than it now appears to me to be. But, my Lords, when I consider the law of charity, its origin and the manner of its development, when I find that, though communities such as this have existed over a considerable period and their charitable character has been rarely advocated and never sustained, I do not think that it is possible to open the door and admit them to the house of charity unless there is some novel and compelling reason for doing so. When I speak of the law of charity, I mean that law which the Court of Chancery and its successor, the High Court of Justice, has evolved from a consideration of the Statute 43 Eliz. c. 4. It is a commonplace that that statute, as its title implied, was directed not so much to the definition of charity as to the correction of abuses which had grown up in the administration of certain trusts of a charitable nature. But from the beginning it was the practice of the court to refer to the preamble of the statute in order to determine whether or not a purpose was charitable. The objects there enumerated and all other objects which by analogy "are deemed within its spirit and "intendment" and no other objects are in law charitable. That is settled and familiar law. I refer to it for two reasons. First, I think that it follows that, however valuable an investigation of the earlier law may be for determining the legality of religious practices (as was shown in *Bourne* v. *Keane* (1)), it is of negligible importance for determining whether an object is charitable. Three hundred and fifty years have passed since the statute became law; few, if any, subjects have more frequently occupied the time of the court. The law of mortmain, the law of perpetuity, and in latter days the revenue law, in all these aspects it has over and over again been the vital issue whether or not an object is charitable, and always it is primarily to the Statute of Elizabeth and not behind it that the court has looked for guidance. And this leads me to my second reason. A great body of law has thus grown up. Often it may appear illogical and even capricious. It could hardly be otherwise when its guiding principle is so vaguely stated and is liable to be so differently interpreted in different ages. But, be that as it may, I suppose that if there was any question on which in this branch of the law an answer based on authority could confidently be given, it would be the question whether a gift to a community such as this was a gift for charitable purposes. This is no question of a patent misinterpretation of a statute. If it were, following *Bourne* v. *Keane* (1), I might not hesitate to say that a new departure should be made. But it is far otherwise. It is a matter in which the court has consistently over a long period of time, acting on those principles which it has laid down for its own guidance, held that a particular object is not charitable. I do not seek to qualify what I recently said in *National Anti-Vivisection Society* v. *Inland Revenue Commissioners* (2), that there may be circumstances in which the court will in a later age hold an object not to be charitable which has in earlier ages been held to possess that virtue. And the converse case may be possible. That degree of uncertainty in the law must be admitted. But I would ask your Lordships to say that it is only a radical change of circumstances, established by sufficient evidence, that should compel the court to accept a new view of this matter. Let me then examine briefly the law as it is to-day and, having done so, ask what are the compelling reasons for a change.

(1) [1919] A. C. 815.

(2) [1948] A. C. 31, 74.

I need not go beyond the case of *Cocks* v. *Manners* (1) which was decided nearly eighty years ago by Wickens V.-C. In that case the testatrix left her residuary estate between a number of religious institutions, one of them being the Dominican Convent at Carisbrooke, a community not differing in any material respect from the community of nuns now under consideration. The learned judge who was, I suppose, as deeply versed in this branch of the law as any judge before or since (for he had been for many years junior counsel to the Attorney-General in equity cases), used these words, which I venture to repeat, though they have already been cited in the courts below (2): "On the Act [sc. the Statute of "Elizabeth] unaffected by authority I should certainly hold "that the gift to the Dominican Convent is neither within "the letter nor the spirit of it; and no decision has been referred "to which compels me to adopt a different conclusion. A "voluntary association of women for the purpose of working "out their own salvation by religious exercises and self-denial "seems to me to have none of the requisites of a charitable "institution, whether the word 'charitable' is used in its "popular sense or in its legal sense. It is said, in some of "the cases, that religious purposes are charitable, but that "can only be true as to religious services tending directly "or indirectly towards the instruction or the edification "of the public; an annuity to an individual, so long as he "spent his time in retirement and constant devotion, would "not be charitable, nor would a gift to ten persons, so long "as they lived together in retirement and performed acts "of devotion, be charitable. Therefore the gift to the "Dominican Convent is not, in my opinion, a gift on a charitable trust." No case, said the learned Vice-Chancellor, had been cited to compel him to come to a contrary conclusion, nor has any such case been cited to your Lordships. Nor have my own researches discovered one. But since that date the decision in *Cocks* v. *Manners* (1) has been accepted and approved in numerous cases. They are referred to in the judgment of Jenkins J. and I need only remind your Lordships, first, that Lindley L.J. in *In re White* (3) used these words: "A society for the promotion of private prayer "and devotion by its own members, and which has no wider "scope, no public element, no purposes of general utility

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(1) L. R. 12 Eq. 574.
(2) Ibid. 585.
(3) [1893] 2 Ch. 41, 51.

"would be a 'religious' society, but not a 'charitable' one: "see *Cocks* v. *Manners* (1)," and, secondly, that in *Dunn* v. *Byrne* (2), Lord Macnaghten in delivering the judgment of the Privy Council refers to *Cocks* v. *Manners* (1) as the exemplar of a case in which the purpose would be considered by a devout Catholic to be conducive to the good of religion but which is "certainly not charitable." I have thus stated the law as it was universally accepted in case-law (except some recent Irish cases) and also in all text-books of authority at the date when these proceedings were begun, and I now ask what is the argument upon which your Lordships are invited to unsettle it.

Apart from what I have called the final argument, which I will deal with later, the contention of the appellant rests not on any change in the lives of the members of such a community as this nor, from a wider aspect, on the emergence of any new conception of the public good, but solely on the fact that for the first time certain evidence of the value of such lives to a wider public together with new arguments based upon that evidence has been presented to the court. Never before, it was urged, has the benefit to be derived from intercessory prayer and from edification been brought to the attention of the court; if it had been, the decision in *Cocks* v. *Manners* (1) would, or at least should, have been otherwise. I have examined the records of *Cocks* v. *Manners* (1) which were supplied to me by the Record Office and I find that the case has been fully and accurately reported. There was no such evidence as was adduced in this case by the appellant and Cardinal Griffin. Nor, as appears from the report, was any argument addressed to this specific point nor any judgment on it. What weight is to be attributed to this, which is the mainstay of the appellant's case? To me, my Lords, despite the admirable argument of Mr. Charles Russell, the weight is negligible. True it is that Wickens V.-C. emphasized that aspect of the religious life which is admittedly its more important aim, "the love and contemplation of "divine things" (3). But "its secondary aim the apostolate, "particularly all that pertains to our neighbours' salvation" (I use the appellant's words) is no new thing and I cannot suppose that it was absent from the learned judge's mind that those, who devote their lives to prayer, pray not for themselves alone, or that they believe that their prayers are not in vain. Nor, as I think, can he have been unaware of the effect which the example of their lives may have upon others. As I venture to think, these aspects of the case were neither insisted on in evidence or argument nor discussed by the learned judge because they do not afford any real support for the contention that there is in the purpose of the community the element of public benefit which is the condition of legal charity.

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(1) L. R. 12 Eq. 574.

(2) [1912] A. C. 407, 410.

(3) L. R. 12 Eq. 574, 585.

My Lords, I would speak with all respect and reverence of those who spend their lives in cloistered piety, and in this House of Lords Spiritual and Temporal, which daily commences its proceedings with intercessory prayers, how can I deny that the Divine Being may in His wisdom think fit to answer them? But, my Lords, whether I affirm or deny, whether I believe or disbelieve, what has that to do with the proof which the court demands that a particular purpose satisfies the test of benefit to the community? Here is something which is manifestly not susceptible of proof. But, then it is said, this is a matter not of proof but of belief: for the value of intercessory prayer is a tenet of the Catholic faith, therefore in such prayer there is benefit to the community. But it is just at this "therefore" that I must pause. It is, no doubt, true that the advancement of religion is, generally speaking, one of the heads of charity. But it does not follow from this that the court must accept as proved whatever a particular church believes. The faithful must embrace their faith believing where they cannot prove: the court can act only on proof. A gift to two or ten or a hundred cloistered nuns in the belief that their prayers will benefit the world at large does not from that belief alone derive validity any more than does the belief of any other donor for any other purpose. The importance of this case leads me to state my opinion in my own words but, having read again the judgment of the learned Master of the Rolls, I will add that I am in full agreement with what he says on this part of the case.

I turn to the second of the alleged elements of public benefit, edification by example. And I think that this argument can be dealt with very shortly. It is in my opinion sufficient to say that this is something too vague and intangible to satisfy the prescribed test. The test of public benefit has, I think, been developed in the last two centuries. To-day it is beyond doubt that that element must be present. No court would be rash enough to attempt to define precisely or exhaustively what its content must be. But it would assume a burden which it could not discharge if now for the first time it admitted into the category of public benefit something so indirect, remote, imponderable and, I would add, controversial as the benefit which may be derived by others from the example of pious lives. The appellant called in aid the use by Wickens V.-C. of the word "indirectly" in the passage that I have cited from his judgment in *Cocks* v. *Manners* (1), but I see no reason to suppose that that learned judge had in mind any such question as your Lordships have to determine.

I must now refer to certain cases on which the appellant relied. They consist of a number of cases in the Irish courts and *In re Caus* (2), a decision of Luxmoore J. A consideration of the Irish cases, shows that it has there been decided that a bequest for the saying of Masses whether in public or in private is a good charitable bequest; see, e.g., *Attorney-General* v. *Hall* (3) and *O'Hanlon* v. *Logue* (4). And in *In re Caus* (2) Luxmoore J. came to the same conclusion. I would expressly reserve my opinion on the question whether these decisions should be sustained in this House. So important a matter should not be decided except upon a direct consideration of it. It is possible that, particularly in regard to the celebration of Masses in public, good reason may be found for supporting a gift for such an object as both a legal and a charitable purpose. But it follows from what I have said in the earlier part of this opinion that I am unable to accept the view, which at least in the Irish cases is clearly expressed, that in intercessory prayer and edification that public benefit which is the condition of legal charity is to be found. It is perhaps significant that even in Ireland, where in regard to the saying of Masses the law has thus been established, there is no consensus of opinion that a gift to a community of contemplative nuns is charitable: see *Munster & Leinster Bank Ld.* v. *Attorney-General* (5); *In re Maguire* (6); and *In re Keogh* (7). From the judgment of Black J. in the first cited case I would quote these words (8) which succinctly express my own view, "There "are perhaps few forms of human activity, good in themselves, "but solely designed to benefit individuals associated for the

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(1) L. R. 12 Eq. 574, 585.
(2) [1934] Ch. 162.
(3) [1897] 2 I. R. 426.
(4) [1906] 1 I. R. 247.
(5) [1940] I. R. 19.
(6) [1943] I. R. 238.
(7) [1945] I. R. 13.
(8) [1940] I. R. 19, 30–1.

H. L. (E.)

1949

GILMOUR v. COATS.

Lord Simonds.

"purpose of securing that benefit, which may not have some "repercussions or consequential effects beneficial to some "section of the general community: and unless a further "and sweeping inroad is to be made on the rule against "perpetuities, the line must be drawn somewhere. *Cocks* v. "*Manners* (1) has drawn it." Of the decision of Luxmoore J. in *In re Caus* (2), I would only say that his ratio decidendi is expressly stated to be, "first, that it [i.e., a gift for the "saying of Masses] enables a ritual act to be performed which "is recognized by a large proportion of Christian people "to be the central act of their religion, and, secondly, that "it assists in the endowment of priests whose duty it is to "perform the ritual act." The decision therefore does not assist the appellant's argument in the present case and I make no further comments on it.

It remains finally to deal with an argument which, as I have said, was not presented to the Court of Appeal but appears in the appellant's formal case. It is that the element of public benefit is supplied by the fact that qualification for admission to membership of the community is not limited to any group of persons but is open to any woman in the wide world who has the necessary vocation. Thus, it is said, just as the endowment of a scholarship open to public competition is a charity, so also is a gift to enable any woman (or, presumably, any man) to enter a fuller religious life a charity. To this argument which, it must be admitted, has a speciously logical appearance, the first answer is that which I have indicated earlier in this opinion. There is no novelty in the idea that a community of nuns must, if it is to continue, from time to time obtain fresh recruits from the outside world. That is why a perpetuity is involved in a gift for the benefit of such a community and it is not to be supposed that, to mention only three masters of this branch of the law, Wickens V.-C., Lord Lindley, or Lord Macnaghten failed to appreciate the point. Yet by direct decision or by way of emphatic example a community such as this is by them regarded as the very type of religious institution which is not charitable. I know of no consideration applicable to this case which would justify this House in unsettling a rule of law which has been established so long and by such high authority. But that is not the only, nor indeed the most cogent, reason why I cannot accede to the appellant's argument. It is a trite saying that the law is life, not logic. But it is, I think, conspicuously true of the law of charity that it has been built up not logically but empirically. It would not, therefore, be surprising to find that, while in every category of legal charity some element of public benefit must be present, the court had not adopted the same measure in regard to different categories, but had accepted one standard in regard to those gifts which are alleged to be for the advancement of education and another for those which are alleged to be for the advancement of religion, and it may be yet another in regard to the relief of poverty. To argue by a method of syllogism or analogy from the category of education to that of religion ignores the historical process of the law. Nor would there be lack of justification for the divergence of treatment which is here assumed. For there is a legislative and political background peculiar to so-called religious trusts, which has I think influenced the development of the law in this matter. Thus, even if the simple argument that, if education is a good thing, then the more education the better, may appear to be irrefutable, to repeat that argument substituting " religion " for " education " is to ignore the principle which I understand to be conceded that not all religious purposes are charitable purposes. It was, no doubt, this consideration which led Wickens V.-C. to say (1) that a gift to a Dominican convent was " one of " the last gifts which the legislature which passed the Act " would have thought of including in it." Upon this final argument I would add this observation. I have stressed the empirical development of the law of charity and your Lordships may detect some inconsistency in an attempt to rationalize it. But it appears to me that it would be irrational to the point of absurdity on the one hand to deny to a community of contemplative nuns the character of a charitable institution but on the other to accept as a charitable trust a gift which had no other object than to enable it to be maintained in perpetuity by recruitment from the outside world.

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(1) L. R. 12 Eq. 574.

(2) [1934] Ch. 162, 170.

Finally I would say this. I have assumed for the purpose of testing this argument that it is a valid contention that a gift for the advancement of education is necessarily charitable if it is not confined within too narrow limits. But that assumption is itself difficult to justify. It may well be that the generality of the proposition is subject to at least two limitations. The first of them is implicit in the decision of Russell J. in *In re Hummeltenberg* (1): the second is one that is not in the nature of things likely to occur, but, if it can be imagined that it was made a condition of a gift for the advancement of education that its beneficiaries should lead a cloistered life and communicate to no one, and leave no record of, the fruits of their study, I do not think that the charitable character of the gift could be sustained.

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(1) L. R. 12 Eq. 574, 585.

For the reasons that I have given I am of opinion that this appeal should be dismissed.

LORD DU PARCQ. My Lords, I cannot usefully add any words of my own to what has been said by my noble and learned friend on the woolsack in support of the view that a principle which has for so long been followed and is so well established as that laid down in *Cocks* v. *Manners* (2) cannot now be repudiated. For the reasons which he has so convincingly stated I believe it to be the duty of your Lordships' House to treat that decision as conclusive of this appeal, unless it be possible to find a real distinction between that case and this. It is on the question whether any such distinction exists that I wish to add some observations. The appellant seeks to draw the necessary distinction on three grounds, none of which, as my noble and learned friend has pointed out, was very likely to have been overlooked in earlier cases if it had any validity. As to the third of these grounds I have only to express my concurrence in what my noble and learned friend has said. The two other contentions were founded on evidence which had not been before the court in *Cocks* v. *Manners* (2). First, there was here evidence that in the belief of the Roman Catholic Church "the prayers "and mortifications of the members of the Church . . . . for "their neighbour both inside and outside the Church advance "religion and are an inestimable spiritual benefit to their "neighbour." (I am now quoting from the affidavit of Cardinal Griffin.) Secondly, there was evidence, which again was lacking in *Cocks* v. *Manners* (2) that the practice of the religious life by the Carmelite nuns is a source of great edification to other Roman Catholics and also (it is said) "in innumerable cases to non-Catholics." Under both these heads, it was submitted, the necessary element of public benefit is found.

(1) [1923] 1 Ch. 237.

(2) L. R. 12 Eq. 574.

My Lords, the first of these three heads of the argument must stand or fall with a further submission which was powerfully urged at the bar and is not without the support of authority. This submission requires the acceptance of the proposition that when a question is raised as to the spiritual efficacy of religious acts, the court is bound to assume that the doctrines of the religion which practises them are true, and must ascertain according to those doctrines whether or not they have the spiritual efficacy which is claimed for them. The learned counsel for the appellant, in their presentation of this argument, naturally relied on the decision of the Court of Appeal in Ireland in *O'Hanlon* v. *Logue* (1), and in particular on the judgment of Palles C.B. in that case. In the earlier case of *Attorney-General* v. *Delaney* (2), the learned Chief Baron had stated the law in these words: "I am of opinion "that a gift for a religious, or for any other purpose, to be "charitable within the Statute of Elizabeth, must, to some "extent at least, be in the nature of a general public use. "It must be of such a nature that the court can determine "that its execution shall confer a benefit upon the public "or upon some section of the public. . . . To constitute a "charitable use in analogy to the Statute of Elizabeth the "purpose must be one which the court itself can ascertain "and declare to be public or beneficial to the public. It "cannot, in my opinion, derive the element of public benefit "from the efficacy spiritual or temporal which, according "to the faith of the testatrix, the religious act may possess." Over thirty years later, in *O'Hanlon* v. *Logue* (1), the learned Chief Baron was persuaded that he had been wrong in the view which he had expressed in *Attorney-General* v. *Delaney* (2), and reached the conclusion that if, according to the doctrines of the religion in question, an act of divine service does result in public benefit, either temporal or spiritual, the act must, in law, be deemed charitable.

My Lords, in my respectful opinion the earlier of these two opinions of Palles C.B. is, and the later is not, consonant with the law as it has developed in England. I must add, after giving careful consideration to the reasoning of the learned Chief Baron in the later case, that it does not seem to me to be convincing. I am now referring to the third reason which the Chief Baron gave for his decision (3), a reason

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(1) [1906] 1 I. R. 247.

(2) (1875) I. R. 10 C. L. 104, 126–7, 129.

(3) [1906] 1 I. R. 247, 275.

H. L. (E.)

1949

GILMOUR
v.
COATS.

Lord du Parcq.

which, as he said, was " of wider application " than the others which he gave, and would, if valid, be applicable to the present case. It may be stated fairly, I think, in this way. The law can only know what spiritual efficacy religious acts have by knowing first what efficacy the doctrines of the particular religion concerned ascribe to them. " But when it knows " those doctrines, although it knows that, according to them, " such an act has the spiritual efficacy alleged, it cannot know " it objectively and as a fact, unless it also knows that the " doctrines in question are true." (1) It cannot know this, and therefore one of two results must follow. " Either (1.) the " law must cease to admit that *any* divine worship can have " spiritual efficacy to produce a public benefit ; (2.) or it " must admit the sufficiency of spiritual efficacy, but ascertain " it according to the doctrines of the religion whose act of " worship it is." My Lords, the learned Chief Baron ruled out the former of these alternatives as impossible, because to accept it, he said (1), would be " to refuse to recognize the " essence of all religion." The other result, therefore, he held, must necessarily ensue. It must be remembered that the law of England recognizes as proper objects of charitable endowment at least all those varied forms in which the Christian religion is professed and practised. In some respect there are differences and irreconcilable conflicts of opinion between some of the many religious bodies which are thus recognized. An argument which leads to the conclusion that the courts, when they are considering whether it is for the public benefit that property should be devoted for ever to a religious purpose are compelled to accept as true any doctrine of a particular religion which ascribes efficacy, spiritual or temporal, to acts which that religion enjoins on its followers, cannot, I think, be sound. The learned Chief Baron (2) spoke of a " hypothetical " admission " of the truth of the religious belief, but a court is not performing its duty if it treats a hypothesis as a proved fact and proceeds to draw inferences from it. It appears to me, therefore, that the conclusion to which one is forced is that expressed by the learned Chief Baron in the earlier case of *Attorney-General* v. *Delaney* (3), that the purpose of the trust must be one which the court itself can determine and declare to be beneficial to the public. Judged by this test, the case before your Lordships cannot in my opinion be distinguished on the first ground from that of the convent in *Cocks* v. *Manners* (1). The conclusion which the Chief Baron feared, that the law would deny spiritual efficacy to all prayers and religious exercises, by no means follows from the adoption of his original opinion. The law may assume, without inconsistency, that all intercessory prayer for spiritual benefits, offered by devout persons of no matter what religion, is capable of benefiting the public generally or a section of it. This will not suffice the appellant. It is not merely on the ground that the nuns offer intercessory prayer that the appellant's case must rest. It is not to be supposed that if they did not live in seclusion they would cease to pray, though it is of course true that a life in the world would not allow them to give their time so unremittingly to prayer and devotion. The religion which they follow with such self-sacrificing zeal itself teaches, as the Cardinal's affidavit tells us, that " public prayer excels any " other." It has not been suggested that private prayer is a fit subject for charitable endowment unless there is something to distinguish it from that offered by the ordinary man. What it would be necessary to accept as a fact in order to show " public benefit " in the sense in which that phrase is used of charity is that (I again quote the Cardinal's words) " the prayers and mortifications of the contemplative and " practising religious are especially efficacious." Here we are outside the region of proof as it is understood in our mundane tribunals. This is ground on which the law does not presume to tread.

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(1) [1906] 1 I. R. 247, 276.

(2) Ibid. 275.

(3) I. R. 10 C. L. 104.

When I turn to the second contention, I find that (apart from the fact that, as has already been said, edification by example is too remote a public benefit to be considered) the same difficulty arises. It is true that those who share the beliefs of these devout women, and some, it may be, of those who do not share them, are moved to admiration, if not to imitation, by the knowledge of their example. But the total effect on the community outside the convent of a life lived according to ideals which one faith, but by no means every faith, ranks among the highest, is something which the law has no means of judging. It happens that in the present case the litigants who were before the court were at one in accepting the tenets of the Roman Catholic religion. If there were evidence before a court concerning religious acts which the creed of a particular church commended, or enjoined as duties, and if

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(1) L. R. 12 Eq. 574.

H. L. (E.)

1949

GILMOUR
v.
COATS.

Lord du Parcq

it were said on behalf of one party to a dispute that these acts resulted in the edification of many, and on behalf of another, that they aroused in the hearts of no less a number of persons feelings injurious to the advancement of religion, it must surely be conceded that no court could properly attempt the task of deciding between the disputants. Indeed, it could hardly be desired by the devout followers of any creed that such a task should be essayed by a temporal court.

I have only to add that although I am unable to accept part of the reasoning which led the Court of Appeal in Ireland to the conclusion that a bequest for Masses, whether they were to be said privately or in public, was a good charitable bequest, I do not desire to express, and indeed have not formed, any opinion as to the propriety of that decision on other grounds. It follows that I must reserve my opinion as to the correctness of the decision of Luxmoore J. in *In re Caus* (1).

I concur in the recommendation of the Committee that this appeal should be dismissed.

LORD NORMAND: My Lords, I agree with the opinions which have been delivered by my noble and learned friend on the woolsack and by my noble and learned friend Lord du Parcq. I have had the advantage of reading the opinion of my noble and learned friend Lord Reid and I concur also with it.

LORD MORTON OF HENRYTON: My Lords, I also have had the advantage of reading the opinions to which my noble and learned friend Lord Normand has referred. I agree with them and I have come to the conclusion that I cannot usefully add anything to them.

LORD REID. My Lords, in this case a sum of money was given to be held by trustees "upon trust if the purposes of the "Roman Catholic Community situate and known as the "Carmelite Priory, St. Charles' Square, Notting Hill, in the "County of London, are charitable to apply the income of "the trust fund to all or any such purposes . . . . but if the "purposes of the said community are not charitable then "upon trust" for other purposes. The question for decision is whether or not the purposes of that community are charitable in the legal sense of that word. It is admitted, and properly admitted, by the appellant that it is not enough to make this gift charitable in the legal sense that it is a gift for religious purposes: the appellant can only succeed by showing that the gift involves a benefit to the public. On the other hand it is not disputed that if benefit to the public can be held to be established the appeal must succeed. Accordingly, the sole point in issue is whether or not there is any ground on which it can be held that the gift would involve public benefit.

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(1) [1934] Ch. 162.

The community referred to is a community of Discalced Carmelite Nuns belonging to one of the Orders of the Roman Catholic Church which are called contemplative Orders. "They are so called because their members are strictly enclosed "in their convents and engage in no exterior works but devote "their lives to contemplation and penance, contemplation "including not only assisting at Mass and reciting the Divine "Office and other vocal prayers but also reflection of the mind "on God and the things of God which evokes from the Will "or heart acts of adoration, propitiation, love and intercession "towards God and which in the case of contemplatives as a "general rule passes sooner or later and to a less or greater "degree into mystical prayer." I quote from the affidavit of Cardinal Griffin. That affidavit and the affidavit of the Prioress of the community set out at length the purposes of the Order and the teaching of the Roman Catholic Church. As I understand it from these affidavits the essential part of that teaching for the present purpose is that the daily prayers and mortification which these nuns offer for others advance religion and are an inestimable spiritual benefit to those both inside and outside the Church, and that the prayers and mortification of contemplatives are especially efficacious in view of the high degree of union with God which results from the following of their vocation.

Mr. Russell for the appellant submitted three grounds on each of which he argued that the appellant is entitled to succeed: if none of these three grounds is valid the appeal must fail. His main argument was that a court is entitled to accept the belief of Roman Catholics that spiritual benefit to mankind flows from intercessory prayer as sufficient to establish the necessary element of public benefit. It was not suggested that the effect of prayer is capable of legal proof by evidence. No temporal court of law can determine the truth of any religious belief: it is not competent to investigate any such matter and it ought not to attempt to do so. How then does the law deal with a question like that now in issue?

The leading authority cited by Mr. Russell was *O'Hanlon* v. *Logue* (1). In that case it was held, on a reconsideration of the older Irish authorities, that the celebration of Mass in private was a charitable purpose. The question there decided is not the same as that which arises in the present case, but many of the reasons stated by the Irish judges are equally applicable to both questions. I shall examine them in some detail; by doing so I shall deal with the main argument for the appellant: Walker C. states (2): "There are some legal "propositions germane to the case for which it would be mere "pedantry to cite authority . . . . (*b*) that included amongst "charitable objects is one which, according to the ideas of "the giver, is for the public benefit." It appears from the report of the argument (3) that there had been cited from the opinion of FitzGibbon L.J., in *In re Cranston. Webb* v. *Oldfield* (4), this passage, " . . . . the benefit must be one "which the *founder* believes to be of public advantage, and "his belief must be at least rational, and not contrary either "to the general law of the land or to the principles of morality." Walker C., appears to have accepted this view and I think that his whole opinion is largely based on it. But Mr. Russell could not maintain that it correctly states the law of England. I do not think that there has been any doubt, at least since the decision of *In re Hummeltenberg* (5), by Russell J., as he then was, that the court cannot accept the opinion of the donor as sufficient to establish public benefit. As regards an opinion or belief other than a religious belief I think that that is conclusively settled by the decision of this House in *National Anti-Vivisection Society* v. *Inland Revenue Commissioners* (6). The point could only now be maintained in the form that when the opinion of the donor is based on a religious belief of the Church of which the donor is a member different considerations apply. That I think is the question to be determined in the present case.

The opinion of Palles C.B., in *O'Hanlon's* case (1) is based on three considerations. In the first place he deals with the validity of gifts for religious purposes prior to the Reformation. Such gifts were regarded as gifts to God and were frequently stated to be gifts to God and to a particular abbey or church. I think that his view was that such a gift was always held to

(1) [1906] 1 I. R. 247.
(2) Ibid. 259.
(3) Ibid. 252.
(4) [1898] 1 I. R. 431, 446–7.
(5) [1923] 1 Ch. 237.
(6) [1948] A. C. 31.

be charitable without there being any need to inquire further whether there was any public benefit involved in it. It may well be that that is correct. It is the next step in his reasoning that I am unable to accept. He takes the view that after the Reformation the only reason why gifts such as gifts for Masses to be celebrated in private ceased to be regarded as charitable was that the purposes of such gifts had been made illegal by statute and that (1) when, "in 1793, all laws prohibiting or "discouraging the practice of the Roman Catholic religion "were repealed, the illegality determined, and they resumed "the character they enjoyed in pre-Reformation times, and "once more became charitable (1.) because of their piety; and "(2.) because they were devoted to the support and maintenance "of the clergymen, the celebrants." With the greatest respect to that great judge I think that he has not given due weight to an essential difference between the position before the Reformation and the position now. Before the Reformation only one religion was recognized by the law and in fact the overwhelming majority of the people accepted it. It was natural that the law should accept the beliefs of that religion without question and act on them. But since diversity of religious beliefs arose and became lawful the law has shown no preference in this matter to any church and other religious body. Where a belief is accepted by some and rejected by others the law can neither accept nor reject, it must remain neutral. If the law before the Reformation accepted gifts for religious purposes as charitable simply because of their piety and without further consideration of the question of public benefit I think that it did so on grounds which are no longer available. I think that Palles C.B. sums up this part of his opinion when he says (1) that the celebration of Mass is "an act from which the common law knew previous to the "Reformation, and therefore knows now, that benefits spiritual "and temporal flow to the general body of the faithful— "benefits which, even were they spiritual only, would render "the service charitable within 10 Car. 1 Sess. 3 c. 1." I have difficulty in seeing how this could be consistent with the law showing no preference to any particular religion. There may be a new religion with new beliefs which the common law never knew. To preserve equality between the old and the new, it would be necessary to hold that the law must also know, in the sense of accepting as true, new beliefs which may directly

(1) [1906] 1 I. R. 273.

contradict the old. Whatever other reasons there may be to support the appellant's case this reason appears to me to be invalid. I am unable to agree with Palles, C.B., when he says (1): "Even had the common law acknowledged more "religions than one, it would have held pious any gift making "provision for the worship of God, irrespective of the particular "acknowledged religion according to which the worship was "to be offered, provided only such religion were recognized "as lawful." If this were so, one would expect to find some authority to support it after the law did acknowledge more religions than one: I have not found it.

The second ground of judgment of the learned Chief Baron appears to be based on the premiss (2): "All will admit "that the divine service of the Reformed Church was, by "virtue of its spiritual efficacy, a charitable act, so long "as it remained the established Church." I can find no basis for drawing a distinction in the matter of charity between the Established Church and other churches. But apart from that it has been decided in England that it is not a charitable purpose to provide for Church of England services in a private chapel: *Hoare* v. *Hoare* (3).

The third ground of Palles C.B.'s judgment is perhaps the most relevant to the present argument. It is to the effect that the only basis on which the law can hold, as it does hold, that public benefit flows from divine worship, is the acceptance as true of the beliefs of the worshippers. Palles C.B. puts a dilemma (4): "There must be one of two results: either "(1.) the law must cease to admit that *any* divine worship "can have spiritual efficacy to produce a public benefit; "or (2.) it must admit the sufficiency of spiritual efficacy, "but ascertain it according to the doctrines of the religion "whose act of worship it is." Holmes L.J. puts the matter thus (5): "I am wholly at a loss to know how, if the court "cannot determine whether the celebration of a private "Mass carries with it public benefits, by what means it can "determine that a Mass said in public confers such benefits." Again I must with great respect suggest that these learned judges have taken too narrow a view. There is another way of looking at the matter which avoids these difficulties.

The law of England has always shown favour to gifts for religious purposes. It does not now in this matter prefer one religion to another. It assumes that it is good for man to have and to practise a religion but where a particular belief is accepted by one religion and rejected by another the law can neither accept nor reject it. The law must accept the position that it is right that different religions should each be supported irrespective of whether or not all its beliefs are true. A religion can be regarded as beneficial without it being necessary to assume that all its beliefs are true, and a religious service can be regarded as beneficial to all those who attend it without it being necessary to determine the spiritual efficacy of that service or to accept any particular belief about it. Admittedly public benefit in the present case can only be established if the court is entitled to accept and act on the beliefs of the Roman Catholic Church. This would, in my view, now be something new.

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(1) [1906] 1 R. R. 247, 270.
(2) Ibid. 274.
(3) 56 L. T. 147.
(4) [1906] 1 I. R. 247, 276.
(5) Ibid. 285.

In *Cocks* v. *Manners* (1), there was a gift to a community which belonged to a contemplative order of the Roman Catholic Church and in that case that gift was held not to be a charitable gift because it lacked the necessary element of public benefit. The only difference between that case and the present case is that in that case there was no evidence of the teaching of the Roman Catholic Church about the efficacy of intercessory prayer or of the special place which these orders occupy in that church; but I find it difficult to believe that these matters were wholly unknown not only to Wickens V.-C., who decided that case, but also to the numerous judges of great eminence, both English and Irish, who have referred to that decision with approval and without even suggesting that it may have been decided without all the relevant facts being before the court. I think that it is also noteworthy that, with one exception, the Irish courts have not since the decision of *O'Hanlon* v. *Logue* (2) taken the view that *Cocks* v. *Manners* (1) should no longer be followed in Ireland. In *Charitable Donations and Bequests Commissioners* v. *M'Cartan* (3), a gift to establish a monastery was held not to be charitable. O'Connor M.R., said (4): "Monasteries of men and women are often, if not mostly, "institutions the members of which devote their lives exclusively "to acts of piety such as pious meditation, prayer and "self-denial. Such institutions, however praiseworthy, are

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(1) L. R. 12 Eq. 574.
(2) [1906] 1 I. R. 247.
(3) [1917] 1 I. R. 388.
(4) Ibid. 396.

"not charitable in the sense recognized by this court." In *Munster & Leinster Bank Ld.* v. *Attorney-General* (1), to which I shall return in another connexion, Black J. recognized *Cocks* v. *Manners* (2) as good law. In *In re Keogh* (3), gifts for the purposes of Discalced Carmelite Orders were held not to be charitable. The one exception is *Maguire* v. *Attorney-General* (4), where Gavan Duffy J. held that a gift here to found a convent for the perpetual adoration of the Blessed Sacrament was charitable. He said (5): "To rescue the gift from the "post-Elizabethan morass and place it upon firm ground, "I am driven back to the earlier position, before proscriptive "legislation had for the time being blocked the steady flow "of the common law." Having expressed the opinion (6) that the case of *O'Hanlon* (7) was decided on the "dual "grounds that the gift was charitable at common law and that "it imported the element of public benefit necessary to bring "a gift within the Statute of Pious Uses" he said, "I rest "my judgment upon the common law." Accordingly this case is not an authority which helps Mr. Russell's main argument on public benefit. For the reasons which I have given I do not think that this argument can succeed.

Before passing to the second argument I should notice the case of *In re Caus* (8). In that case Luxmoore J. held following *O'Hanlon* v. *Logue* (7) that a bequest for private Masses was a good charitable gift. There are grounds on which it can be argued that such a gift is charitable which do not apply to the present case. I express no opinion whether this decision can be supported on these grounds. But in my view it cannot be supported on the ground that a court is entitled to accept the beliefs of Roman Catholics or the teaching of the Roman Catholic Church regarding the Mass as sufficient to establish the necessary element of public benefit.

Mr. Russell's second argument is founded on Cardinal Griffin's affidavit in which it is stated: "It is an undoubted "fact that the practice of the religious life by the Carmelite "nuns and other religions is a source of great edification "to other Catholics—and indeed in innumerable cases to "non-Catholics—leading them to a higher estimation of

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(1) [1940] I. R. 19.
(2) L. R. 12 Eq. 574.
(3) [1945] I. R. 13.
(4) [1943] I. R. 238.
(5) Ibid. 250.
(6) Ibid. 254.
(7) [1906] 1 I. R. 247.
(8) [1934] Ch. 162.

"spiritual things and to a greater striving after their own "spiritual perfection and that the knowledge that there are "men and women who are prepared to sacrifice all that the "worldly in man holds dear in order to attain a greater love "of God and union with Him inculcates in them a greater "estimation of the value and importance of the things which "are eternal than they would have if they had not these "examples before them." This argument must be considered on the footing that it has already been decided that the necessary element of public benefit cannot be directly established under the first argument—otherwise the appellant would succeed without this argument. Mr. Russell relies on a passage in the judgment of Wickens V.-C., in *Cocks* v. *Manners* (1): "It is said, in some of the cases, that religious "purposes are charitable, but that can only be true as to religious services tending directly or indirectly towards the "instruction or the edification of the public." He says that it is proved by evidence that the public or at least a sufficient section of the public are edified. I doubt whether Wickens V.-C. meant to use the word edification in this sense. But whether he did or not there must be some limit to the kind of indirect instruction or edification which will constitute a public benefit. It is hard to imagine any form of religious activity by an organized religious body which does not have some effect of this kind, and if the words were applied literally the requirement of public benefit would virtually disappear. Mr. Russell admitted that it must be a question of degree whether or not in any case the public benefit is too remote. In this case I think it is too remote. Moreover, I do not think that, when a decision has stood for three-quarters of a century as *Cocks* v. *Manners* (1) has, it ought to be reversed on a question of degree of this kind. No broad principle is here involved. I agree with the view of Black J. in *Munster & Leinster Bank Ld.* v. *Attorney-General* (2) "unless "a further and sweeping inroad is to be made on the rule "against perpetuities, the line must be drawn somewhere. "*Cocks* v. *Manners* (1) has drawn it."

The third argument submitted by Mr. Russell is of a different character. It was not submitted to the Court of Appeal. It is that the existence of this community enables some twenty women to practise religion in a way which would otherwise be impossible for them; and that, if the law recognizes the

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(1) L. R. 12 Eq. 574, 585.

(2) [1940] I. R. 19, 31.

H. L. (E.)
1949
Gilmour v. Coats.
Lord Reid.

practice of religion as beneficial, it must regard any gift to enable religion to be practised more fully as a gift for a beneficial purpose. On this argument the necessary element of public benefit is found in the fact that the twenty persons benefited are not drawn from any limited class but from the whole body of Roman Catholic women who have a vocation for a contemplative life. I am prepared to assume that, if the law can regard the purposes of this community as beneficial, the necessary element of public benefit could be so found. But this argument, like the last, can only be reached after the appellant has failed on the first argument and it has therefore been decided that the law is disabled from recognizing any public benefit resulting from the existence of the community. Mr. Russell when asked was unable to cite any authority to the effect that it can be a valid charitable purpose to assist persons to do something which cannot be shown to have any public utility. In the absence of authority I can see no reason why this should be regarded as a valid charitable purpose and therefore I think that this argument fails.

Accordingly I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Witham & Co.*

Solicitors for respondents: *Ellis, Bickersteth, Aglionby & Hazel.*

Applied. Re Isle of Thanet Electric Supply Co., Ltd. [1949] 2 All E.R. 1060.

Applied. In re Isle of Thanet Electricity Supply Co. [1950] 1 Ch. 161

H. L. (Sc.)*
1949
Mar. 1, 2, 3;
May 6.

[HOUSE OF LORDS]

SCOTTISH INSURANCE CORPORATION, LIMITED . . . . APPELLANTS;

AND

WILSONS & CLYDE COAL COMPANY LIMITED . . . . RESPONDENTS.

Company—Reduction of capital—Impending liquidation—Colliery company—Nationalization of industry—Shareholders' rights—Preference and ordinary shares—Companies Act, 1929 (19 & 20 *Geo.* 5, *c.* 23),

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* *Present:* Viscount Maugham, Lord Simonds, Lord Normand and Lord Morton of Henryton.

H. L. (Sc.)
1949
SCOTTISH INSURANCE CORPORATION LD.
v.
WILSONS & CLYDE COAL CO. LD.

s. 55, *sub-s.* 1—*Coal Industry Nationalization Act,* 1946 (9 & 10 *Geo.* 6, *c.* 59), *s.* 25.

The Coal Industry Nationalization Act, 1946, s. 25, sub-s. 1, enacted with reference to the compensation payable in respect of assets transferred under the Act: "Provision shall be made by "regulations for due regard being had, as between classes . . . . of "members . . . . of a company being an owner of transferred "interests, to what their relative expectations of income yield "from their respective interests in the company would have been "if this Act had not been passed, and for that purpose the regula-"tions shall provide facilities for adjusting the respective interests "of such classes in the company's assets as affected by the "substitution of the compensation under this Act for the trans-"ferred interests of the company so as to give effect, so far as may "be, on the one hand to the said expectations and on the other "hand to the rights of priority conferred on such classes respec-"tively by . . . . the memorandum and articles of association "of the company."

The colliery assets of a coal mining company having been transferred to the National Coal Board under the Act of 1946, it was the intention of the company to go into voluntary liuqidation. Meanwhile it proposed to reduce its capital by returning their capital to the holders of the preference stock, which would be thereby extinguished. By art. 139 of the articles of association the directors were authorized to set aside a reserve fund which they might use (inter alia) for paying off the preference capital. By art. 141 (*a*) the company might convert any undivided profits into capital and distribute it among the ordinary stockholders. By arts. 159 and 160 in the event of a winding up the preference stock ranked before the ordinary stock to the extent of repayment of the amounts called up and paid thereon. No compensation had been assessed under the Act of 1946 and no regulations had yet been made under s. 25, sub-s. 1, thereof. The reduction of capital was opposed by certain preference stockholders on the ground that it deprived them of the advantages of their investment; that it deprived them of the right to participate in the liquidation and the division of the company's surplus assets; and that it deprived them of the opportunity of a favourable adjustment of their interests under s. 25 of the Act.

Held (per Viscount Maugham, Lord Simonds and Lord Normand, Lord Morton of Henryton dissenting), that the proposed reduction was not unfair or inequitable and should be confirmed, because, even without it, the preference stockholders would not be entitled in a winding up to share in the surplus assets or to receive more than a return of their paid-up capital; accordingly they could not object to being paid, by means of the reduction, the amount which they would receive in the proposed liquidation.

In re Metcalfe & Sons, Ld. [1933] Ch. 142 overruled.

In re Bridgewater Navigation Co. [1891] 2 Ch. 317, approved. ✓

The court, in exercising its jurisdiction under s. 51, sub-s. 1, of the Companies Act, 1929, should regard the provisions of s. 25, sub-s. 1, of the Act of 1946 as no more than a factor to be included in the consideration of the fairness of the proposed reduction; the onus is on those opposing the reduction to show how the subsection can operate to give them any right to a share in the assets beyond those provided for by the articles of association and this the preference stockholders had not done.

Decision of the First Division of the Court of Session (sub nom. *Wilsons & Clyde Coal Co., Ld.* v. *Scottish Insurance Corporation, Ld.*) 1948 S. C. 360, affirmed.

Appeal from the First Division of the Court of Session.

The facts, summarized from their Lordships' opinions, were as follows: The respondent company were incorporated as a limited company in 1876 for the purpose of acquiring and carrying on certain colliery undertakings in Lanarkshire. In 1923, by special resolution, they adopted new articles of association of which the following were relevant in the present case: "11. The company in general meeting may, from time "to time by special resolution, increase the capital by the "creation of new shares of such amount as may be deemed "expedient. 12. The new shares shall be issued upon such "terms and conditions, and with such rights and privileges "annexed thereto, as by the special resolution creating the "same may be directed, and if no direction shall be given, as "the directors determine; and in particular, such shares may "be issued with a preferential or qualified right to dividends "and to ranking in the distribution of the assets of the "company, and with a special or without any right of voting, "or partly in one of these forms and partly in another . . . . "17. The company may, from time to time, by special resolu-"tion reduce its capital . . . . 78. On a show of hands "every member shall have one vote only, and, in case of a poll, "every member . . . . shall have one vote for every share "held by him, whether such share be an ordinary or a "preference share . . . . 128. Subject to the rights of "members entitled to shares issued upon special conditions, "and subject as hereinafter provided, the profits of the "company, after setting aside any amount which may be "carried to any reserve fund, written off for depreciation or "otherwise, shall be applied in order of priority in manner "following, viz.: Firstly. To the payment of a cumulative "preferential dividend at the rate of 7*l.* per centum per annum "on the capital for the time being paid up or credited as paid "up on the preference shares (first issue). Secondly. To the "payment of a cumulative preferential dividend at the rate of "7*l*. per centum per annum on the capital for the time being "paid up or credited as paid up on the preference shares "(second issue), but only after satisfying the dividends payable "on the said preference shares (first issue); and Thirdly. "The residue shall be divisible among the holders of the "ordinary shares in proportion to the amounts paid up or "credited as paid up on the shares held by them respectively ". . . . 129. The company in general meeting may declare "a dividend to be paid to the members according to their "rights and interests . . . . 139. The directors may . . . . "before recommending . . . . any dividend . . . . out of ". . . . the earnings or profits of the company . . . . set "aside out of such profits, such sum as they may think proper "as a reserve fund to be used . . . . as the directors may "think fit in meeting contingencies or depreciation in the "value of the property of the company, or to be used in the "extension of its property or works, or for repairing, improving "and maintaining any of the property of the company, for "removing buildings, erections and plant, and restoring or "paying for non-restoration of ground at the termination of "the mineral leases, or earlier, or for providing against losses, "meeting claims on, or liabilities of the company, or for "equalizing or supplementing dividends or for division by "way of bonus to the ordinary shareholders, or as bonuses "to the employees of the company, or for repaying any moneys "borrowed by the company, or for making provision for paying "off the preference share capital, or for such other purposes "as the directors shall, in their absolute discretion, think "conducive to the interests of the company or its shareholders ". . . . 141(A). The company in general meeting may, "on the recommendation of the directors, from time to time "by ordinary resolution convert any undivided profits of the "company available for dividends on its shares (whether "such profits should stand to the credit of any reserve fund or "reserve account or a profit and loss account of the company or "otherwise and including divisible profits arising by way of "permanent appreciation in value of any of the company's "assets), into capital, and appropriate and distribute the same "among the members of the company who are holders of "ordinary shares, in proportion to the amounts paid up on the "shares held by them respectively, by way of bonus, or they "may apply such undivided profits in or towards satisfaction "of the amounts unpaid in respect of any shares in the capital "of the company allotted among such ordinary shareholders "or previously unissued . . . . 159. In the event of the "company being wound up, the preference shares (first issue) "shall rank before the other shares of the company on the "property of the company, to the extent of repayment of the "amounts called up and paid thereon. 160. In the event of "the company being wound up, the preference shares (second "issue) shall rank before the ordinary shares but after the said "preference shares (first issue) on the property of the company "to the extent of repayment of the amounts called up and "paid thereon." (The articles last set out were the first two of a group headed "Distribution of assets on winding up.") By cl. 5 of the memorandum of association: "The capital of "the company is 150,000*l.* divided into 15,000 shares of 10*l.* "each, with power to the company to increase their capital "by the creation and issue of new shares, either ordinary, or "having such preference, priority and special privileges "attached thereto as may be determined by special resolution "of the company." In exercise of this power the respondent company from time to time increased or altered their capital. At the date of the special resolution of September 26, 1947, hereinafter referred to, the nominal capital stood at 850,000*l.* and the issued capital at 725,000*l.* divided into 40,000*l.* first preference seven per cent. cumulative stock, 10,000*l.* second preference seven per cent. cumulative stock and 675,000*l.* ordinary stock. There remained unissued 125,000 ordinary shares of 1*l.* each. The first and second preference stock represented issues of preference shares made in 1875 and 1894 respectively. In 1937 the preference shares had been converted into preference stock and the ordinary shares converted into ordinary stock.

On January 1, 1947, the colliery assets of the respondent company were, in terms of the Coal Industry Nationalization Act, 1946, transferred to and vested in the National Coal Board, which was constituted under that Act. The immediate result was that their effective business was thereby brought to an end and they could no longer pursue the objects for which they were incorporated. It was their avowed intention to go into voluntary liquidation. This was, however, postponed until the compensation payable to them under the Act had been assessed and paid, an event which at the date of the hearing of this appeal could not be assumed to be immediately impending.

At an extraordinary general meeting held on September 26, 1947, the chairman stated that, pending further consideration of the probable liquidation of the company, it had been decided to apply to the court for the approval of a special resolution "that the share capital of the company be reduced from "850,000*l*. divided into 40,000 preference shares 7 per cent. "(first issue) of 1*l*. each (all of which have been issued and fully "paid and converted into 40,000*l*. first preference stock) "10,000 preference shares seven per cent. (second issue) of "1*l*. each (all of which have been issued and fully paid and "converted into 10,000*l*. second preference stock) and 800,000 "ordinary shares of 1*l*. each (of which 675,000 have been issued "and fully paid and converted into 675,000*l*. ordinary stock "and 125,000 are unissued) to 462,500*l*. divided into 337,500*l*. "ordinary stock and 125,000 ordinary shares of 1*l*. each and "that such reduction be effected by returning to the holders of "the said 40,000*l*. first preference stock and 1,000*l*. second "preference stock capital to the full extent of 1*l*. in respect of "each 1*l*. unit of such stocks held by them respectively and "extinguishing the said first preference stock and second "preference stock accordingly and by returning to the holders "of the said 675,000*l*. ordinary stock capital to the extent of "10*s*. in respect of each 1*l*. unit of such stock held by them "respectively." This resolution was passed, thirty-eight members voting in favour of the resolution and three against it. Not all those who voted in favour of the resolution were ordinary stockholders nor did all the preference stockholders vote against it.

The resolution, the formal validity of which was not challenged, having thus been passed, the respondent company, as the Companies Act, 1929, required, presented a petition to the Court of Session for confirmation of the reduction. The appellants, who lodged answers to the petition for confirmation, were seventy-one preference stockholders, holding among them about forty-five per cent. of the first and second preference stock. They averred "that the preference stock . . . . "carries a right to a seven per cent. cumulative dividend ". . . . In view of the company's strong financial position ". . . . the dividend on the preference stock is . . . . "extremely well secured . . . . The value of the preference "stock has for many years been above par. But for the "passing of the Coal Industry Nationalization Act, 1946, the "said dividend would have remained secured and covered as "aforesaid and would have been paid for many years to come. "If the preference stock is extinguished . . . . the preference "stockholders will be unfairly and illegally deprived of their "rights to an adjustment under s. 25 of the Coal Nationalization "Act, 1946 . . . . The [appellants] believe and aver that "in view, inter alia, of the high expectation of a well secured "income yield . . . . if the said Act had not been passed, an "adjustment in terms of the said section will secure to the "preference stockholders interests in the company's assets as "affected by the substitution of compensation under the said "Act considerably greater than the par value of the preference "stock. The present proposal . . . . for the repayment of "the whole of the preference stock is therefore unfair and "inequitable. It is designed to deprive, or in any event does "deprive, the preference stockholders of their legitimate "share in the company's assets by virtue of the said s. 25. "Furthermore . . . . when the amount of compensation due "to the company in respect of its transferred assets has been "ascertained, it will be necessary to adjust the interests of "the various classes of stockholders in the company's assets "in the terms of the said section . . . . and the amount of "capital repayable to each class of stockholder in the subsequent and inevitable liquidation will fall to be calculated in "accordance with the said adjustment. The effect of the said "special resolution is to deprive the preference stockholders of "their rights to such an adjustment and it is therefore unfair. "In addition and in any event the said special resolution is "unfair and inequitable because it deprives the preference "stockholders of their rights to share pari passu with the "ordinary stockholders in the surplus assets of the company "when the liquidation, which is admittedly inevitable, takes "place." On February 17, 1948, the First Division of the Court of Session (Lord Russell and Lord Keith, Lord President Cooper dissenting) repelled the answers as irrelevant in hoc statu and made an order for the usual procedure to follow. Against that interlocutor the appellants appealed to the House of Lords. The principal reasons for allowing the appeal set out in their formal case were as follows: "1. Because the "proposed reduction of capital is unfair and inequitable as "between the two classes of the company's stockholders "inasmuch as it deprives the preference stockholders of their "right to participate in the surplus assets of the company on "liquidation and leaves the ordinary stockholders in sole "possession of the assets. 2. Because the proposed reduction "of capital unfairly and illegally deprives the preference "stockholders of their right to an adjustment of their interest "in the company's assets as affected by the payment of com"pensation under s. 25 of the Coal Industry Nationalization "Act, 1946. 3. Because the proposed reduction is contrary "to, or in any event frustrates, the object of s. 25, and therefore "ought not to be sanctioned by the court."

Sir Cyril Radcliffe K.C. (of the English Bar), *Morison K.C.* and *William Grant* (both of the Scottish Bar) for the appellants. When the respondent company reached virtual liquidation there was no longer a power to reduce its capital if that would bring about a different situation as between different classes of stockholders from that which would have existed had completion of the liquidation been awaited. The whole transaction represents a struggle between two sets of stockholders for a share in the assets at the liquidation. Such a reduction as this should not obtain the court's sanction. In this company in a liquidation the preference stockholders are entitled, under their contract, to share in the distribution of the whole of the surplus assets; there is no distinction between different kinds of assets and the preference stockholders rank pari passu with the ordinary stockholders, after repayment of the paid-up preference capital and the paid-up ordinary capital in that priority. It is clear that there will be surplus assets and if the reduction were confirmed the preference stockholders would be deprived of their share in them, while, at their expense, the ordinary stockholders would appropriate the whole remaining assets. The business is being taken over by legislative action; the liquidation is imminent and, from the point of view of the business, there is no reason for a repayment of capital now. The proposed reduction is unfair and inequitable to the preference stockholders, discriminating against them as a class. In judging of its fairness or unfairness, the situation at the date of the special resolution must be considered. The proposed reduction was not designed to further the respondent company's objects; it was merely the first step in an inevitable liquidation; accordingly the equity of the proposed reduction must be tested by reference to the rights of the preference stockholders as a class on liquidation. It is unfair and inequitable because the preference stockholders would be deprived prematurely of a good investment which is irreplaceable and which they would otherwise have continued to enjoy; they would also be deprived of their rights in the property of the respondent company in the liquidation which has been begun. The rights of the preference shareholders are properly laid down in *In re William Metcalfe & Sons, Ld.* (1); see also *Williamson-Buchanan Steamers, Ld.* (2). *Will* v. *United Lankat Plantations Co., Ld.* (3) is distinguishable because there the question was as to the rights of preference shareholders in respect of dividends while the company was a going concern. Here the company having ceased to carry on business and being virtually in liquidation, the proposed reduction should not be confirmed since a reduction of capital within s. 55 of the Companies Act, 1929, cannot be effected as part of the process of liquidation. *In re Wallasey Brick & Land Co. Ld.* (4) was rightly decided and *Alloa Coal Co. Ld.* (5) was wrongly decided. In deciding whether a proposed reduction is fair and equitable and ought to be sanctioned the power of the court is full and unqualified: see *British & American Trustee & Finance Corporation* v. *Couper* (6) and *Poole* v. *National Bank of China, Ld.* (7). The passage in Buckley on Companies (11th ed.) p. 120, as to the manner in which, in the case of reduction, loss is to be borne or money returned among the several shareholders, is subject to the power of the court to sanction or refuse to sanction the reduction according as it is or is not fair and equitable. The prima facie working of any rules in this matter can always be challenged if it is not just and equitable that they should be put into effect; they can always be departed from in a proper case; see *In re MacKenzie & Co., Ld.* (8); *Bannatyne* v. *Direct Spanish Telegraph Co.* (9); *In re Barrow Hæmatite Steel Co.* (10); *In re Quebrada Railway Land & Copper Co.* (11); *In re Gatling Gun Co. Ld.* (12); *In re Union Plate Glass Co.* (13); *In re London & New York Investment Corporation* (14); *In re Floating Dock of St. Thomas, Ld.* (15); *Balmenach-Glenlivet Distillery, Ld.* v. *Croall* (16). In the present case there is an attempt to turn the rule as to return of capital unfairly against the preference stockholders. Preference shareholders have all the rights of shareholders save in so far as they have renounced them: see *Birch* v. *Cropper* (1). The question arises: was there to be implied any contract on the part of these preference stockholders governing the question of reduction of capital and were they bound to submit to redemption of their holdings at par? They were not. Their contract is contained in the articles of association and it is important that in construing commercial documents there should not be over-subtle distinctions. The position of the preference shareholders is not affected by art. 139, under which the reserve fund may be used for paying off the preference capital; it mainly points to the source from which preference capital may be paid off in the event of repayment being sanctioned. Nor does art. 141 (A), under which undivided profits may be capitalized and appropriated to making a bonus distribution to the ordinary stockholders affect the position. The unfairness of the proposed reduction cannot be justified by suggesting that an equally unfair result could be achieved by an alternative method. Moreover, such a distribution would attract surtax and bonus tax to such an extent as to make it contrary to the interests of the ordinary stockholders. However, such a use of these articles would not be actually illegal. The preference stockholders rely on the word " rank " in arts. 159 and 160 which implies an ulterior right to participate in the company's property after their right to a return of capital and that of the ordinary shareholders has been satisfied. There is a distinction between the rights of stockholders to dividends while the company is a going concern and their rights in a liquidation first to return of capital and secondly to surplus assets; as to the latter these articles are silent.

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(1) [1933] Ch. 142.
(2) 1936 S. L. T. 106.
(3) [1912] 2 Ch. 571; [1914] A. C. 11.
(4) (1894) 70 L. T. 870.
(5) 1947 S. C. 651.
(6) [1894] A. C. 399, 406.
(7) [1907] A. C. 229.
(8) [1916] 2 Ch. 450.
(9) (1886) 34 Ch. D. 287.
(10) (1888) 39 Ch. D. 582.
(11) (1888) 40 Ch. D. 363.
(12) (1890) 43 Ch. D. 628.
(13) (1889) 42 Ch. D. 513.
(14) [1895] 2 Ch. 860.
(15) [1895] 1 Ch. 691.
(16) (1906) 8 F. 1135.

Further, a new circumstance has been introduced into the exercise of the court's discretion by s. 25 of the Coal Industry Nationalization Act, 1946, since, whatever the quality of their rights, there is now vested in all members of the company a right to a chance of favourable consideration by the tribunal appointed under the Act. If there is a chance and not an absolutely remote prospect the position must be kept open. This section is part of the compensation provisions and is mandatory in requiring provision to be made for due regard being had, as between different classes of members of a company, to their relative expectations of income yield.

(1) (1889) 14 App. Cas. 525, 546.

H. L. (Sc.)

1949

SCOTTISH INSURANCE CORPORATION LD.
v.
WILSONS & CLYDE COAL CO. LD.

Provision was also to be made for adjusting the respective interests of those classes in the company's assets. The general intention is plain. Parliament was fully conscious that it was bringing to an end the business of these colliery concerns and that this would affect many persons who held interests in the companies. The section was designed to deal with the problem of adjusting the rights of the shareholders which were many and various ; it was put into the statutory scheme because the sort of question now before the House was bound to arise. It being the intention of Parliament that the interests of different classes of stockholders should be subject to an adjustment under the regulations to be made by virtue of s. 25, the court should decline to confirm reductions of capital before the settlement and payment of compensation. The court can no longer exercise its jurisdiction to do so, because it cannot decide what is a fair way of dealing with the assets of the company until after the compensation has been awarded. The section was designed to prevent the interests of such shareholders as holders of high-yielding preference shares being prejudiced by the compulsory acquisition of the businesses of colliery companies. Whether their right to an adjustment under the Act is existing or prospective, the appellants cannot fairly be deprived of it. This preference stock carries a seven per cent. dividend ranking for payment before any dividend on the ordinary stock ; the dividend, which represents a high income yield, has been regularly paid. Having regard to the priority rights of the preference stockholders and to their continuing expectation of a high and well-secured income yield, if the Act had not been passed, an adjustment, which treats this stock as a producer of income will secure them an interest in the company's assets, as affected by the compensation under the Act, considerably greater than the par value of the preference stock. The proposed reduction frustrates the object of s. 25. Effect could be given to the priority of the preference stockholders by calculating the compensation on the basis of a certain number of years' purchase. [They also referred to the Coal Industry Nationalization Act, 1946, ss. 5 and 11, sub-s. 8 ; *In re Barrow Hæmatite Steel Co.* (1) ; *Fife Coal Co., Ld.* v. *Arniston Coal Co., Ld.* (2) ; *William Dixon, Ld.* (3) and *In re Chatterley-Whitfield Collieries, Ld.* (4).]

(1) [1900] 2 Ch. 846, 855 ; [1901] 2 Ch. 746.

(2) 1948 S. C. 505.

(3) 1948 S. C. 511.

(4) [1948] 2 All E. R. 593, 599.

Cameron K.C. (Dean of the Faculty), *J. F. Gordon Thompson K.C.* and *C. J. D. Shaw* (all of the Scottish Bar) for the respondent company. The appellants have not shown that the proposed reduction is unlawful or unfair and inequitable to them. In this respect the burden of proof is on them. The holders of fifty-five per cent. of the preference stock are in favour of the reduction. The jurisdiction invoked is discretionary and the question is whether the proposals are fair and equitable to the preference stockholders, the ordinary stockholders and to the company itself. The answer ultimately depends on the construction of the contract by virtue of which the members of each class are members of the company viz., the memorandum and articles of association. Other cases in which the terms of the contract were differently expressed do not provide precedents to be rigidly applied, but the following principles govern the matter: (*a*) On the assumption that a proposed reduction does not involve the diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital in prejudice of the rights of creditors, and is not capable of prejudicing the interests of members of the public who may be induced to take shares in the company, the only relevant consideration is, whether the proposed reduction is fair and equitable as between different classes of shareholders. (*b*) Apart from the interest of creditors, the question whether each member shall have his share proportionately reduced or whether some members shall retain their shares unreduced, the shares of others being extinguished on their receiving a just equivalent, is a purely domestic matter. (*c*) The court has no jurisdiction to interfere with the internal management of companies acting within their powers. (*d*) In considering whether a particular class of shareholders is receiving a just equivalent for their shares "the inference to be drawn "from the fact that the Act is silent as to the manner in "which, in case of reduction, loss is to be borne or money is "to be returned, as among the several shareholders, is that, if "it be a loss, it is to be borne among them in such manner "as under the constitution of the company loss in respect "of capital is to be borne, and if it be money to be returned, "it is in like manner to be returned as capital is returnable": Buckley on the Companies Acts (11th ed.) p. 120. This passage appears unrevised and in identical terms since the 7th ed. (p. 581) prepared by the author and the late Lord

H. L. (Sc.)

1949

SCOTTISH INSURANCE CORPORATION LD. v. WILSONS & CLYDE COAL CO. LD.

Clauson in 1897. In the light of these principles the contract between the company and the objecting shareholders (viz., the memorandum and articles of association) must be examined to determine whether the proposed reduction could be said to be unfair and inequitable in the absence of any expressed intention by the company to go into liquidation at a date to be later determined and on the assumption that the Coal Industry Nationalization Act, 1946, had not been passed. The company must be regarded as a separate person and the two competing classes of shareholders are separate and the expression "fair and equitable" as between the interested parties means that no undue hardship shall be suffered in the light of the contract which each made and the circumstances in which it was entered into. The keynote is relative hardship. The contract itself provides the measure of fairness and equity in the case. The form of the company's articles of association is not unusual in the case of companies with more than one class of shareholder. The status and rights of the preference stockholders in the company as a going concern are defined and circumscribed by art. 128 under which the profits (after payment of the preference dividend) are divisible among the ordinary stockholders. Under art. 139 there is power to set aside, out of profits, a reserve which may be used for paying off the preference share capital. The preference stockholders were thereby given warning that they might be paid off some day while the company was a going concern. They became members of the company with that knowledge and they cannot complain if the event happens. Any surplus assets are attributable to the abstinence of the ordinary stockholders in the past in the matter of dividends and it would now be possible for them to use their voting power under art. 78 to divide them among themselves either by declaring a large ordinary dividend under art. 129 or by capitalizing the undivided profits under art. 141 (A) and distributing the resulting capital among themselves by way of bonus. The possible resulting tax liability has no relevance to the question. In arts. 128 and 139 the company is being dealt with as a going concern. The door is finally closed on any possible interest of the preference stockholders in accumulated profits by art. 141 (A). Thus under these articles there could have been achieved by other methods the same results as the reduction proposes to bring about. Finally, arts. 159 and 160 contain an exhaustive statement of the rights of the preference stockholders in a liquidation; they are not limited to a statement of a priority, leaving those stockholders free to participate in surplus. The ranking referred to therein is, and is intended to be, a final ranking and a limitation of the rights of the preference stockholders. When a specific limitation of their rights in the assets on a winding up is found in the articles, one starts, not with any idea of equality, but with the nature of the limitation. This assumption of initial equality is a fallacy. The preference stockholders have no right to rank pari passu with the ordinary stockholders in the distribution of the surplus assets on a winding up. They can get no more than the repayment of their capital at par and so it is no hardship to receive that while the company is a going concern. Accordingly this reduction is fair and equitable. If the construction of the articles were in doubt the majority of the stockholders could use their voting power to alter them and remove any ambiguity. A company is entitled to return capital in excess of its wants: see Buckley on the Companies Acts (11th ed.), p. 123. Here the earning capacity of the company has been reduced to a minimum by operation of law and it is good sense, in the circumstances, to jettison stock carrying a high income yield. It is of no moment whether the reduction of earning power results from legislation or from some other cause. It is admitted that the capital of the company is now in excess of its requirements and so one of the necessary conditions for a reduction is established. Henceforth, if the preference stockholders receive dividends it will be by parasitical feeding on the assets of the ordinary stockholders. Even if they had a right to share in the surplus assets in a winding up, it would be inequitable for them to insist on staying in the company at the expense of the ordinary stockholders in order to exercise that right. Since the preference stockholders can be repaid their capital at par at any time, they have no security of tenure. Nor can they complain of being deprived of an alleged right to share in the surplus assets. In an application such as the present, considerations as to the rights of members in a future liquidation are irrelevant. There is no known status of a company being moribund or comatose. Either it is in liquidation or it is not and the members when they join it contract on the basis of those two alternatives. There is no half-way house—half law, half fact and almost wholly picturesque language. Moreover, the preference shareholders are inconsistent. They demand dividends as though

H. L. (Sc.)

1949

SCOTTISH INSURANCE CORPORATION LD. v. WILSONS & CLYDE COAL CO. LD.

the company were a going concern and in that respect they do not ask it to be treated as being virtually in liquidation. There has been no resolution to wind up nor is there any obligation to wind up at a particular time. The company remains in full possession of its statutory powers and functions, undiminished by any process of liquidation and the rights of the stockholders inter se must be regulated without consideration of what may be the situation after an interval of time, the length of which cannot be foreseen. Further, in any event, the preference stockholders have no right to participate in the surplus assets on a liquidation. *In re William Metcalfe & Sons Ld.* (1) is distinguishable. The wording of the relevant articles there was quite different; there were no such provisions as the respondents rely on. In that case the relevant articles were so worded that the court held that, as they dealt only with paid-up capital and made no reference, expressly or by implication, to any surplus assets, these fell to be distributed equally among all the shareholders according to the number of shares held by each. Here, however, arts. 159 and 160 deal with the distribution of the whole free property of the company available on winding up and exhaust the preference stockholders' right to participate in the capital fund and surplus assets. If necessary the respondents challenge the correctness of *In re William Metcalfe & Sons Ld.* (1). It is not reconcilable with *Will* v. *United Lankat Plantations Co. Ld.* (2). Its error is that the court there failed to give weight to the prima facie difference in the quality of the different classes of shares; it was assumed that all shares are born free and equal and that only afterwards do they receive certain limiting characteristics. The present type of case is distinguishable from *Birch* v. *Cropper* (3). [They also referred to *In re Dicido Pier Co.* (4).] As to s. 25 of the Coal Industry Nationalization Act, 1946, the considerations relied on by the appellants are irrelevant. Nothing in it amends the Companies Act or even inferentially restricts a company's powers to deal with its shareholders. The fairness of the proposed reduction cannot be affected by the vague possibility of some future advantage to the preference stockholders. It is for the appellants to show that they will obtain any benefit under s. 25, indicating how the substitution of compensation for colliery assets will affect their interest in the company's assets. The preference stockholders are not given by s. 25 a vested indefeasible right in anything, because, if the general law as to the power of the court to approve a reduction of capital still remains in the case of such a company as this, it cannot be said that s. 25 creates a vested right. What they get is at best a spes successionis in an estate which may never be an asset and may even prove to be a liability. The value of the spes successionis is very small. Regard should be had to the consequences of accepting the appellants' argument, which might impose substantial hardship on the ordinary stockholders, as by having to pay the preference stockholders' dividends out of the stored-up reserves. The balance of convenience and hardship tells heavily in favour of the ordinary stockholders. This is not a straight fight between two classes of stockholders but a competition as to priorities. Whatever the true interpretation of s. 25, it does not present the preference stockholders with a bonus payable from public funds greater than the fullest amount which they could claim under the most favourable conditions in a liquidation ; no benefit accrues to them beyond that secured by the memorandum and articles of association. The section is a factor, but no more than a factor, to be taken into consideration in assessing the fairness of the proposed reduction.

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(1) [1933] Ch. 142.

(2) [1914] A. C. 11.

(3) 14 App. Cas. 525.

(4) [1891] 2 Ch. 354.

Sir Cyril Radcliffe K.C., in reply. From Mr. Stamp's argument in *In re William Metcalfe & Sons Ld.* (1) it appears that there were in that case articles comparable to those in the present case. In *Will* v. *United Lankat Plantations Co., Ld.* (2) there were facts peculiar to that case and not present here. See also *In re National Telephone Co.* (3) ; *In re Fraser & Chalmers Ld.* (4) ; *Collaroy Co. Ld.* v. *Giffard* (5), and *Williamson-Buchanan Steamers Ld.* (6). The rights of the corporator at the stage of dividing assets are not touched on by the principles relating to dividend rights and the right to have their capital returned. Treating this purely as a question of construction, the preference stockholders have a right in the winding up to share in the surplus assets. Though the proportion of preference stock held by the appellants is only 45 per cent., it is not to be assumed that all the rest are actively in favour of the proposed reduction. As to s. 25 of the Coal Industry Nationalization Act, 1946, there is nothing to show that the preference stockholders had no reasonable expectation of receiving anything by virtue of it. The expectations of the preference stockholders in relation to those of the ordinary stockholders were high. Under the terms of s. 25 the nationalization must be ignored. It is only because of the nationalization that the assets were available to buy out the preference stockholders. If in the interval before the payment of compensation this machinery were used to destroy a class of stockholders, the compensation provisions would be frustrated and that would be wrong. The power of the court to approve such a scheme as this is not formally touched on. It is not a question of the existence of its power but of something which bears on the exercise of the court's discretion, during the transition period only with regard to such proposals as can be shown to involve frustration of s. 25.

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(1) [1933] Ch. 142, 144–5.

(2) [1912] 2 Ch. 571, 577 ; [1914] A. C. 11.

(3) [1914] 1 Ch. 755.

(4) [1919] 2 Ch. 114.

(5) [1928] Ch. 144.

(6) 1936 S. L. T. 106.

Their Lordships took time for consideration.

May 6. VISCOUNT MAUGHAM. My Lords, the facts in this case are sufficiently stated in the speech of my noble and learned friend Lord Simonds which I have had the advantage of studying in print, and I see no benefit to be gained by repeating them. I also agree with the conclusions which he has reached, and if I think it is desirable to express my own opinion on the construction of the articles of association, so far as they bear on the question whether the proposed reduction of capital is fair and equitable as between the ordinary shareholders and the preference shareholders, it is because there has been a difference of opinion in the First Division of the Court of Session and your Lordships have listened to the citation of a large number of authorities which are thought to bear upon the matter in debate. I should perhaps add that I have arrived at my conclusion by somewhat different considerations from those upon which Lord Simonds prefers to lay stress.

I will begin by treating the matter as if s. 25 of the Coal Industry Nationalization Act, 1946, did not enter into the case. The company, as a matter of law, is not in liquidation and I agree with the view that the circumstance that liquidation is contemplated in the near future ought not to affect the construction of the terms on which the preference shares were issued, that is, in this case, the articles of association, which are to be found set out in Lord Simonds' speech. We are not therefore entitled in considering the question of fairness to shut our eyes to the fact that the directors still have their powers as such and that they and the shareholders at any time before liquidation can exercise their rights under arts. 139 and 141 (A).

My Lords, if I am right so far I can see no great difficulty in the present case. We must first have regard to the plain terms of art. 128. It is a complete statement of the rights of the shareholders to the profits earned year by year by the company as a going concern, subject to two supplementary articles, arts. 139 and 141, which must be read with it. Article 128 begins with saving the rights of members entitled to shares issued upon special conditions. The words in the article as to division of " the residue " (after the word " thirdly ") are perfectly clear, and they beyond doubt show that subject to a reserve fund and amounts written off for " depreciation or otherwise " (a far-reaching phrase) and to payment of cumulative preferential dividends due on the two issues of preference shares the whole residue is divisible among the holders of the ordinary shares in proportion to the amounts paid up or credited as paid up on their shares. The amounts of profits so distributed may obviously be less or greater than the amounts paid up or credited as paid up; but the preference shareholders have no share in the residue. So far the article has only dealt with the rights of the ordinary shareholders to the whole of the *divisible* profits (the so-called " residue ") after paying the preference dividends, and there would remain the reserve fund, and any proper provision for depreciation and also, no doubt, sums carried forward, which, of course, would normally come into the profit and loss account for the next year. The ordinary shareholders for obvious reasons are not given any immediate right to call for division of these amounts of profit, but arts. 139 and 141 make clear provision that the items in question are only being retained among the company's undistributed assets so long as it is thought expedient, and it is these articles which in my opinion clinch the matter. Article 139, after elaborate provisions as to how the reserve fund is to be employed and subject to a number of permissible applications for the general benefit of the undertaking, contains the following words as to distribution, "or for division by way of bonus to the "ordinary shareholders, or as bonuses to the employees of the "company, or for repaying any moneys borrowed by the "company, or *for making provision for paying off the preference "share capital*, or for such other purposes as the directors "shall, in their absolute discretion, think conducive to the "interests of the company or its shareholders." I have italicized the words as to paying off the preference share capital The words are none the less important because the reduction of capital would require the sanction of the court. They show at least that, if the transaction is fair and equitable, the article contemplates that the preference shareholders can be paid off with or without their consent. Article 141 (A) is also of great importance. It provides for the conversion into capital of undivided profits standing to the credit of a reserve fund, or a profit and loss account "*or otherwise, and including "divisible profits arising by way of permanent appreciation in "value of any of the company's assets*" and the distribution of these amounts "*among the members of the company who are "holders of ordinary shares.*" My comment on the words I have here italicized is that if the undertaking of the company had been sold for cash (and provision made out of a reserve fund or otherwise for payment of debts and liabilities and for paying off the preference share capital) every penny could be distributed among the holders of ordinary shares. I should add here that I agree with Lord Keith (1) that the suggestion that such a distributon is unlikely because of the surtax liability which might accrue to the richer of the recipients is an accidental consideration which ought not to be considered.

My Lords, for these and other reasons given by your Lordships, my conclusion is that taking these articles together it is reasonably clear that subject to the payment to the preference shareholders of their capital and their preferential dividends if any not yet paid, and subject also to discretionary applications by the directors under the terms of arts. 139 and 141 as above set forth, the whole of the reserve funds and other assets of the company, including the proceeds of sale of the capital assets, are appropriated to the ordinary shareholders and in that sense belong to them to the exclusion of the preference shareholders.

If, then, the question of the approval by the court falls to be considered in the light of the present position of the company it must follow that the main argument of unfairness falls to the ground, but I am not prepared to deny that the admitted intention to go into liquidation might be one of the facts which the court ought to consider and I will therefore state my opinion on that footing. If there is a liquidation arts. 159 and 160 will apply to the first and second issues of the preference shareholders which are sufficiently stated in the speech of my noble friend. Are they a complete statement of the rights attached in a winding up to the preference shares or should such shares also have a right to participate with the ordinary shares in the remaining assets after payment of the amounts called up and paid up on the ordinary shares? My Lords, I am of opinion that the articles in question must be construed as a complete statement of the rights of the preference shares in the winding up for the reason that the whole of the profits and assets of the company (subject to payment of the amounts called up and paid on the preference shares) has been appropriated before liquidation to the ordinary shareholders, and that there is not a word to indicate that on liquidation the rights of the preference shareholders (if they have not already been paid off) would be increased, perhaps very materially, by attributing to them part of the profits and assets which have been appropriated to the ordinary shareholders. There might perhaps have been some doubt as to the compensation payable under the Coal Industry Nationalization Act as being "surplus assets" of the nature of capital not distributable as dividend; and I will deal later with this point.

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(1) 1948 S. C. 360, 374.

The view which I have suggested as to the effect of an appropriation of profits in favour of a certain class of shareholders is supported by a decision of Lord Lindley (then Lindley L.J.) in the Court of Appeal (*In re Bridgewater Navigation Co.* (1)), a sequel to the important case in this House of *Birch* v. *Cropper* (2). The facts were briefly these. The capital of the company was divided into preference and ordinary shares. It was the owner of the Bridgewater and other canals which it sold in 1887 for 1,710,000*l.* to the Manchester Ship Canal Co. It then went into liquidation. ✓ The liquidators paid all the debts and liabilities, and repaid to the preference and ordinary shareholders the amount of capital paid up on their shares. There remained in their hands a surplus of 550,000*l.*; and the question arose how this

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(1) [1891] 2 Ch. 317.

(2) 14 App. Cas. 525.

H. L. (Sc.)

1949

SCOTTISH INSURANCE CORPORATION LD. v. WILSONS & CLYDE COAL CO. LD.

Viscount Maugham.

sum should be distributed between the ordinary and the preference shareholders. The latter might have been entitled under art. 85, while the company was a going concern, to a preferential dividend of 5 per cent. and there was (in the view of this House) no other relevant term or condition as to their rights, but on liquidation the article ceased to be applicable. Part of the 550,000*l.* consisted of three distinct reserve funds for river improvements, insurance and depreciation; and none of these funds were actually set apart from the other assets of the company. In the books of the company they were sums deducted from profits which the ordinary shareholders might have divided among themselves; they were the undrawn profits of the ordinary shareholders. But the House of Lords did not deal with these items. They decided (see per Lord Macnaghten (1)) (in the complete absence of any such articles as we have in this case) that subject to the payment of the costs, charges and expenses of the winding up and to the costs of the application "the assets of the company "remaining undistributed other than the reserve fund, which "is not the subject of this application, ought to be distributed "among all the shareholders in proportion to their shares." When the question of the reserve funds came before the Court of Appeal in *In re Bridgewater Navigation Co.* (2), it was held that since the assets or amounts in question consisted of the undrawn profits of one class, those profits ought to be distributed in the winding up amongst the members of that class in the absence of some sufficient reason to the contrary; and there was no such reason. In the result the ordinary shareholders were exclusively entitled to the three reserve funds. I have to doubt that this was a correct decision, and there was no appeal. Apart however from any authority, I cannot see any sufficient reason for coming to a conclusion other than the one I have above indicated. In my view it is a sound prima facie rule that profits which have been appropriated, subject to possible application for the benefit of the company, to the ordinary shareholders to the exclusion of the preference shareholders must, in the absence of some other consideration, remain the property of the former on a winding up. It should be observed that in the case last cited there were no such articles as exist in the present case, which is an a fortiori one. Much reliance is placed on behalf of the appellants on the case of *In re William Metcalfe & Sons Ld.* (3). I must say that in my opinion that case was wrongly decided; and it should be noted that it is expressly stated (1) that the bulk of the sum of 21,000*l.* there in dispute was attributable to accumulated profits. It seems to me difficult to reconcile that case with the decision of this House in *Will* v. *United Lankat Plantations Co. Ld.* (2) and impossible to reconcile it on sound grounds with the decision of *In re Bridgewater Navigation Co.* (3).

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(1) 14 App. Cas. 525, 548.

(2) [1891] 2 Ch. 317.

(3) [1933] Ch. 142.

It is true that the general principle does not by itself apply to moneys arising from appreciations in value of capital; but in the present case I read art. 141 as showing that such appreciations are appropriated (in the sense in which I use the word) to the ordinary shareholders. Apart from that view, it seems to me that any doubt as to the attribution of such special assets is removed by the terms of arts. 159 and 160 which refer to "the property of the company" as a whole, and do not justify the conferring of a further right to the preference shares beyond the amounts called up and paid thereon. Such a right would require definition and cannot in my opinion be derived as a matter of construction from the language of the two articles. I doubt whether there exist any such assets in the present case, where the colliery assets were transferred compulsorily under the Coal Industry Nationalization Act, 1946. Counsel for the appellants in his forcible argument claimed—and I think with prudence—that his clients were entitled to share in the whole of the (so-called) surplus assets; and no distinction was drawn between different kinds of such assets.

The question that arises as to the effect, if any, of s. 25 of the Coal Industry Nationalization Act, 1946, is due to the difficulty of appreciating its purpose or its implications. I agree with the preliminary considerations stated by Lord Greene M.R. which are to be found in his judgment on the appeal in the case of *In re Chatterley-Whitfield Collieries Ld.* (4) including his remarks as to the drafting of the regulations which are contemplated by the section. In particular I agree with the following remark (5): "One thing the section "clearly does not do. It does not purport expressly or "impliedly to limit or affect in any way the existing provisions "of the Companies Act, or the well-known practice of the

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(1) [1933] Ch. 142, 143.
(2) [1914] A. C. 11.
(3) [1891] 2 Ch. 317.
(4) [1948] 2 All E. R. 593.
(5) Ibid. 599.

"courts thereunder, or to lay down any new principles for "the court to follow." The regulations contemplated by the section have now been published and the remark of the Master of the Rolls applies with additional force. It would, I think, be going too far to say that in confirming or refusing to confirm a reduction of the capital of a colliery company the court ought to act as if the Coal Industry Nationalization Act, 1946, had not been passed. On the other hand, I think those who oppose the reduction by founding their argument on the provisions of s. 25 are bound to indicate how the section or the regulations which have recently been made thereunder, on any reasonable view of probability, can operate in this case to give the preference shareholders any rights to share in the assets beyond those they now possess under the articles of association. Taking the view I have expressed as to the position of these shareholders either now or in a liquidation and agreeing with my noble and learned friend in the view that the court in the exercise of its jurisdiction should regard the provisions of s. 25 as a factor in its consideration of the fairness of a proposed reduction, I find myself unable to see any want of fairness in the proposed reduction of capital. I will summarize the grounds of my decision as follows. The case is one in which liquidation, when it comes, will have been brought about by the action of the legislature. If there were no reduction of capital the holders of preference shares would not in my opinion be entitled in a winding up to anything more than a return of their paid-up capital. I am quite unable to see why they should claim more on the proposed reduction, nor why they should object to being repaid by means of the reduction the amounts so paid up which they would receive on the proposed liquidation. In my opinion the decision of the judges of the Court of Session by a majority was right and the appeal must be dismissed. The answers should be repelled as irrelevant and the petition should now be remitted to a reporter. The appellants must pay the costs of the appeal.

LORD SIMONDS. My Lords, on January 1, 1947, the colliery assets of the respondent company, Wilsons & Clyde Coal Co. Ld., which I will call the respondents, were in terms of the Coal Industry Nationalization Act, 1946, transferred to and vested in the National Coal Board, which was constituted under that Act. Thus the effective business of the respondents was brought to an end and it is their avowed intention in due course to go into voluntary liquidation. But this they will not do until the compensation payable to them under the Act has been assessed and paid, an event which at the hearing of this appeal in March, 1949, could not be assumed to be immediately impending. In the meantime they have all the powers of a company which is not in liquidation and I cannot attach any legal significance to the description of them as "comatose," "moribund," or "having one foot in the grave." [His Lordship stated the facts and continued :] At an extraordinary general meeting held on September 26, 1947, the respondent company passed a special resolution for the reduction of its capital from 850,000*l.* (consisting of 40,000*l.* first preference stock, 10,000*l.* second preference stock and 800,000 ordinary shares of 1*l.* each, of which 675,000 had been issued and converted into 675,000*l.* ordinary stock), to 462,500*l.* divided into 337,500*l.* ordinary stock and 125,000 ordinary shares of 1*l.* each and for effecting such reduction by returning to the holders of the first and second preference stocks of 1*l.* for each unit of stock held by them and extinguishing such stocks and by returning to the holders of the 675,000*l.* ordinary stock capital to the extent of 10*s.* for each unit of such stock held by them. It appears that not all those who voted for the resolution were ordinary stockholders, nor did all the preference stockholders vote against it, nor do they all now oppose the reduction. I do not think that your Lordships can get any guidance from the way in which votes were given. The resolution, of which the formal validity is not challenged, having thus been passed, the respondents, as the Companies Act, 1929, requires, presented a petition to the Court of Session for confirmation of the reduction, and on February 17, 1948, in spite of opposition by the appellants, who hold about 45 per cent. of the first and second preference stock of the company and lodged answers, by which they averred that the proposed reduction was contrary to law and in any event unfair and inequitable, the First Division of the Court of Session, consisting of the Lord President, Lord Russell and Lord Keith (the Lord President dissenting) repelled the answers as irrelevant in hoc statu and made an order for the usual procedure to follow. Against that interlocutor the present appeal is brought.

My Lords, apart from a special factor which is introduced into it by the provisions of s. 25 of the Coal Industry

Nationalization Act, 1946, which I will call the Coal Act, I do not entertain any doubt about this case. The court should in my opinion confirm the reduction upon which the respondents have resolved.

The Companies Act, 1929, no more than its predecessors, prescribes what is to guide the court in the exercise of its discretionary jurisdiction to confirm or to refuse to confirm a reduction of capital. But I agree with the learned Lord President that, important though its task is to see that the procedure, by which a reduction is carried through, is formally correct and that creditors are not prejudiced, it has the further duty of satisfying itself that the scheme is fair and equitable between the different classes of shareholders: see e.g. *British & American Trustee & Finance Corporation Ld.* v. *Couper* (1). But what is fair and equitable must depend upon the circumstances of each case and I propose, ignoring for the moment the particular factor introduced by the Coal Act, to consider the elements on which the appellants rely for saying that this reduction is not fair to them.

In the formal case which they have presented to the House the element of unfairness on which the appellants insist is that the reduction deprives them of their right to participate in the surplus assets of the company on liquidation and leaves the ordinary stockholders in sole possession of those assets. But in their argument both in the Court of Session and before your Lordships they have further relied on the fact that they have been deprived of a favourable 7 per cent. investment which they cannot hope to replace and might have expected to continue to enjoy. They further contend that the deprivation of these rights, which would in any case have been an unmerited hardship, is rendered the more unfair because it is likely to be followed at an early date by liquidation of the company or, as it is less accurately expressed, because it is itself only a step in the liquidation of the company.

The first plea makes an assumption, viz., that the articles give the preference stockholders the right in a winding up to share in surplus assets, which I for the moment accept but will later examine. Making that assumption, I yet see no validity in the plea. The company has at a stroke been deprived of the enterprise and undertaking which it has built up over many years: it is irrelevant for this purpose that the stroke is delivered by an Act of Parliament which

(1) [1894] A. C. 399.

at the same time provides some compensation. Nor can it affect the rights of the parties that the only reason why there is money available for repayment of capital is that the company has no longer an undertaking to carry on. Year by year the 7 per cent. preference dividend has been paid; of the balance of the profits some part has been distributed to the ordinary stockholders, the rest has been conserved in the business. If I ask whether year by year the directors were content to recommend, the company in general meeting to vote, a dividend which has left a margin of resources, in order that the preference stockholders might in addition to repayment of their capital share also in surplus assets, I think that directors and company alike would give an emphatic negative. And they would, I think, add that they have always had it in their power, and have it still, by making use of arts. 139 or 141, to see that what they had saved for themselves they do not share with others. I observe that the learned Lord President (1) was of opinion that such a use of one or other of these articles would be an impropriety which would at least be open to challenge in a court of law, but learned counsel for the appellants candidly admitted that he could not support this view. Reading these articles as a whole with such familiarity with the topic as the years have brought, I would not hesitate to say, first, that the last thing a preference stockholder would expect to get (I do not speak here of the legal rights) would be a share of surplus assets, and that such a share would be a windfall beyond his reasonable expectations and, secondly, that he had at all times the knowledge, enforced in this case by the unusual reference in art. 139 to the payment off of the preference capital, that at least he ran the risk, if the company's circumstances admitted, of such a reduction as is now proposed being submitted for confirmation by the court. Whether a man lends money to a company at 7 per cent. or subscribes for its shares carrying a cumulative preferential dividend at that rate, I do not think that he can complain of unfairness if the company, being in a position lawfully to do so, proposes to pay him off. No doubt, if the company is content not to do so, he may get something that he can never have expected but, so long as the company can lawfully repay him, whether it be months or years before a contemplated liquidation, I see no ground for the court refusing its confirmation. To combat the suggestion that, so far as any benefit to the preference stock-

(1) 1948 S. C. 360, 379.

holders is concerned, the position is substantially the same whether they are now repaid their capital or full use is made of arts. 139 and 141, it was urged that the incidence of income tax would be a sufficient deterrent of this alternative measure. I do not, however, consider that the court can properly have regard to such a consideration as this in determining what is fair between the parties. It might indeed be considered improper to do so if it drove the ordinary stockholders to a course less advantageous to themselves but no more advantageous to the preference stockholders.

It will be seen, my Lords, that, even making an assumption favourable to the appellants, I reject their first plea. But it is perhaps necessary, in case there should be a division of opinion which would make this a decisive issue, that I should shortly examine the assumption. It is clear from the authorities, and would be clear without them, that, subject to any relevant provision of the general law, the rights inter se of preference and ordinary shareholders must depend on the terms of the instrument which contains the bargain that they have made with the company and each other. This means, that there is a question of construction to be determined and undesirable though it may be that fine distinctions should be drawn in commercial documents such as articles of association of a company, your Lordships cannot decide that the articles here under review have a particular meaning, because to somewhat similar articles in such cases as *In re William Metcalfe & Sons Ld.* (1) that meaning has been judicially attributed. Reading the relevant articles, as a whole, I come to the conclusion that arts. 159 and 160 are exhaustive of the rights of the preference stockholders in a winding up. The whole tenor of the articles, as I have already pointed out, is to leave the ordinary stockholders masters of the situation. If there are "surplus assets" it is because the ordinary stockholders have contrived that it should be so, and, though this is not decisive, in determining what the parties meant by their bargain, it is of some weight that it should be in the power of one class so to act that there will or will not be surplus assets.

There is another somewhat general consideration which also, I think, deserves attention. If the contrary view of arts. 159 and 160 is the right one and the preference stockholders are entitled to a share in surplus assets, the question will still arise what those surplus assets are. For the profits

(1) [1933] Ch. 142.

though undrawn, belong, subject to the payment of the preference dividend, to the ordinary stockholders and, in so far as surplus assets are attributable to undrawn profits, the preference stockholders have no right to them. This appears to follow from the decision of the Court of Appeal in *In re Bridgewater Navigation Company* (1), in which the judgment of the House of Lords in *Birch* v. *Cropper* (2) is worked out. This again is not decisive of the construction of particular articles, but I am unwilling to suppose that the parties intended a bargain which would involve an investigation of an artificial and elaborate character into the nature and origin of surplus assets.

But, apart from those more general considerations, the words of the specifically relevant articles, " rank before the other " shares . . . on the property of the company to the extent " of repayment of the amounts called up and paid thereon," appear to me apt to define exhaustively the rights of the preference stockholders in a winding up. Similar words, in *Will* v. *United Lankat Plantations Co. Ld.* (3), " rank, " both as regards capital and dividend, in priority to the other " shares," were held to define exhaustively the rights of preference shareholders to dividend, and I do not find in the speeches of Viscount Haldane L.C. or Earl Loreburn in that case any suggestion that a different result would have followed if the dispute had been in regard to capital. I do not ignore that in the same case in the Court of Appeal (4) the distinction between dividend and capital was expressly made by both Cozens-Hardy M.R. and Farwell L.J., and that in *In re William Metcalfe & Sons Ld.* (5) Romer L.J. reasserted it. But I share the difficulty, which Lord Keith has expressed in this case (6), in reconciling the reasoning that lies behind the judgments in *Will's* case (3) and *In re William Metcalfe & Sons Ld.* (7) respectively. In *Collaroy Co. Ld.* v. *Giffard* (8) Astbury J., after reviewing the authorities, including his own earlier decision in *In re Fraser and Chalmers* (9), said (10): " But whether the considerations affecting them [sc. capital " and dividend preference respectively] are ' entirely different ' " is a question of some difficulty," and approved the proposition

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(1) [1891] 2 Ch. 317.
(2) 14 App. Cas. 525.
(3) [1914] A. C. 11, 13.
(4) [1912] 2 Ch. 571.
(5) [1933] Ch. 142, 161.
(6) 1948 S. C. 363, 374.
(7) [1933] Ch. 142.
(8) [1928] Ch. 144.
(9) [1919] 2 Ch. 114.
(10) [1928] Ch. 144, 155.

H. L. (Sc.)
1949

SCOTTISH INSURANCE CORPORATION LD. *v.* WILSONS & CLYDE COAL CO. LD.

Lord ~~Normand~~.
Simonds

there urged by the ordinary shareholders that a fixed return of capital to shareholders in a winding up is just as artificial as a provision for a fixed dividend and that, if the latter is regarded as exhaustive, there is no prima facie reason why the former should not be similarly regarded. So also that learned judge was influenced by the consideration which appears to me to have much weight, that, if such an article as our art. 159 is regarded as a complete definition of the rights of the preference stockholders in a winding up, then there is a logical consistency between their rights before and after the company is put into liquidation. In effect I prefer the reasoning of Astbury J. in the case last cited to that of Eve J. and the Court of Appeal in *In re William Metcalfe & Sons Ld.* (1). Counsel for the appellants in the present case sought to draw a distinction between the right to repayment of capital and the right to some further share in surplus assets and pointed to the fact that arts. 159 and 160 said nothing about surplus assets. But this distinction is not in my opinion in the present context a valid one. Articles 159 and 160 are the first two in a number of articles headed " Distribution " of assets on winding up " and there is nothing in them to suggest a distinction between " surplus assets " and " property " of the company," the expression in fact used in arts. 159 and 160, required for repayment of capital or distributable as surplus assets. Nor, I think, is the latter expression used throughout the articles : it is perhaps an expression which is better avoided.

Finally on this part of the case I ought to deal with an observation made by Lord Macnaghten in *Birch* v. *Cropper* (2) upon which counsel for the appellants relied. " They," he said, " [sc. the preference shareholders] must be treated as " having all the rights of shareholders, except so far as they " renounced these rights on their admission to the company." But, in my opinion, Lord Macnaghten can have meant nothing more than that the rights of the parties depended on the bargain that they had made and that the terms of the bargain must be ascertained by a consideration of the articles of association and any other relevant document, a task which I have endeavoured in this case to discharge. I cannot think that Lord Macnaghten intended to introduce some new principle of construction and to lay down that preference shareholders are entitled to share in surplus assets unless they expressly and specifically renounce that right.

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(1) [1933] Ch. 142.

(2) 14 App. Cas. 525, 546.

For these reasons I reject the assumption upon which the appellants' first plea is founded.

I can deal shortly with the other element of unfairness upon which the appellants rely, viz., that they have been prematurely deprived of a favourable investment. Much that I have already said is equally applicable here. Funds being available for payment off of capital, the natural order is to pay off that capital which has priority and I see no glimmer of unfairness in the company doing so at the earliest possible moment, particularly if, their undertaking having been wrested from them, they can no longer earn 7 per cent. or anything like it on their money.

I am of opinion then that, apart from the special considerations arising from s. 25 of the Coal Act, the appellants objections to the proposed reduction have no substance. I turn then to this section. I will not repeat its provisions. The appellants say (I quote their formal reasons) that "the "proposed reduction of capital unfairly and illegally deprives "the preference stockholders of their right to an adjustment "of their interest in the company's assets as affected by the "payment of compensation under s. 25 of the Coal Industry "Nationalization Act, 1946," and that it "is contrary to, "or in any event frustrates, the object of s. 25, and therefore "ought not to be sanctioned by the court." In argument it has been urged that the preference stockholders have a statutory right to adjustment, with which the court either cannot or should not interfere.

I dissent at once from the major proposition that in view of s. 25 it is no longer competent for the court to exercise its jurisdiction under s. 55 of the Companies Act, 1929. It is impossible to read any such implication into s. 25 of the Coal Act or to suppose that the jurisdiction of the court could have been intended to be ousted except by express words. The greater difficulty lies in the alternative proposition, that at least in the exercise of a discretionary jurisdiction the court ought not to preclude any interested party from the opportunity of such advantage as s. 25 might afford him. And in support of this view it may be urged that until the statutory compensation has been awarded it is not possible to predicate of any class of shareholders what is a fair way of dealing with any of the assets of the company. I have felt the force of this argument. But, if it is accepted, the court must in the result hold its hand in every case, in which a company carrying on a colliery undertaking proposes either to reduce its capital or to enter into a scheme of arrangement affecting classes of shareholders or debenture holders, perhaps too even where debenture holders take proceedings to enforce their security, on the ground that by exercising jurisdiction it might prejudice the inchoate rights of some person under s. 25 of the Coal Act. I cannot think it right to accede to a suggestion which would involve so much delay and inconvenience to companies which wish to rearrange their affairs in view of the changes brought about by the Act. I prefer therefore to adopt the view put forward by the learned Dean of Faculty and to say that the court should in the exercise of its jurisdiction regard the provisions of s. 25 as a factor to be included in its consideration of the fairness of a proposed reduction, but no more than that. It is in that way that I propose to examine the section in relation to the present proposal.

The section looks forward to regulations to be made in due course, which are to provide facilities for adjusting the respective interests of different classes in the company's assets so as to give effect, so far as may be, to "their relative "expectations of income yield" and to their respective "rights of priority." At the date of the proceedings in the Court of Session no regulations had been made and it was legitimate to hope that, when they were made, they would throw further light on the way in which effect should be given to expectations of income yield and rights of priority. That hope has been disappointed; for regulations have now been made, but they do not illumine the darkness. The court therefore has on the one hand to take into account all those factors with which I have already dealt in considering whether the proposed reduction apart from the Coal Act is fair and the further, by no means negligible, factor that the interposition of further months and perhaps years of delay can be nothing but a hardship to the ordinary stockholders, and on the other hand the factor that the preference stockholders might at long last get something better than they are now getting, i.e., repayment in full of their capital, a possibility resting not on any sure guidance in the section or regulations, but on the speculative hope that, since there is no guidance, anything may happen.

It does not appear to me, my Lords, that there is in this latter factor such weight as to justify the court in saying that the reduction here proposed is not fair and equitable between the different classes of shareholders. I do not want to prejudge what may happen in any similar case that comes before a tribunal to be set up under this Act. But I find it difficult to conceive circumstances in which preference stockholders, being repaid their capital in full and their claims to priority being thus satisfied, can yet assert with any hope of success that their expectations of income yield relative to those of the ordinary stockholders entitle them to something more.

I am therefore of opinion that the court has properly exercised its jurisdiction in confirming the proposed reduction and that this appeal should be dismissed with costs.

LORD NORMAND. My Lords, the appellants are certain of the preference stockholders who lodged answers to the petition for confirmation. Their objections to the proposed reduction are that it deprives them prematurely of the advantage of a well secured 7 per cent. investment; that it deprives them of a right to participate in the liquidation along with the ordinary stockholders in the division of the property of the company if any remains after repayment of the capital of all stockholders; and that it deprives them of the opportunity of obtaining a favourable adjustment of their interests under s. 25 of the Coal Industry Nationalization Act, 1946.

I shall begin by dealing with the first and second of these objections and it is first necessary for that purpose to consider what are the rights of the preference stockholders under the articles of association. These articles give clear notice to the preference stockholders that there is no assured permanence of their right to a cumulative 7 per cent. dividend, and there is no unfairness in abridging, if that were all, the brief period now remaining before liquidation, in which dividends might still be paid, by the use of the power to repay preference capital. The appellants' case, indeed, was not founded so much on the loss of their expectation of future dividends as on the deprivation of the major right which they said they had in the property of the company in a liquidation, and if their case on this major ground fails, their case upon loss of expectation of dividend must fall with it. So much is this true that there would have been, I think, no opposition if a substantial pari passu repayment of the capital of all stockholders had been proposed. What the appellants object to is the complete extinction of their rights as stockholders by the repayment of their whole capital on the eve of liquidation, and their main claim is that as corporators they have an equal right with the ordinary stockholders to share in the company's property in a liquidation, unless that right is excluded by the terms of those articles by which their rights are conferred. The chief controversy is therefore whether arts. 159 and 160 contain an exhaustive statement of their rights in a liquidation, excluding any further right to share in what have been called the surplus assets of the company. But these articles can only be properly understood if they are read in conjunction with arts. 17, 78, 128, 139 and 141 (A). The cumulative effect of these articles is to give the ordinary stockholders power until liquidation begins to distribute among themselves in one way or another all accretions to capital which may arise either from the profits of the company or from the permanent appreciation of its assets, and I find it difficult to reconcile a power so comprehensive in its scope with an intention that the preference stockholders should, after liquidation takes place, retain an interest in the company's property beyond what is necessary to satisfy their prior claim for the return of their capital. The wording of arts. 159 and 160 appears to be well designed to give effect to this limitation of their rights. The appellants placed some reliance on the word "rank," which they said implied an ulterior right to participate in the company's property after their priority right to a return of capital and the ordinary stockholders' right to a like return were satisfied. In support of this view it was argued that there were three elements to be considered, the rights of the stockholders to dividends while the company was a going concern, and in a liquidation their rights first to a return of their capital and second to "surplus assets." I am unable to assent to these contentions. The word "ranking" may be used, and in Scottish legal practice it is habitually used, of an absolute and exhaustive right; and it carries no implication of an ulterior right not included in the ranking. Moreover in art. 12, which empowers the issue of new shares "with a preferential "or qualified right to dividends and to ranking in the distribu-"tion of the assets of the company," the word "ranking" is plainly used with reference to a right which may be exhaustive. The rights in liquidation are not two rights but one, a right to participate in the division of the company's property. In arts. 159 and 160 the priority ranking of the preference stockholders is expressly a ranking on "the property of the "company" and there is no room for the suggestion that these articles leave over a further unexpressed ranking also on the property of the company. I therefore come to the conclusion that, subject to the argument based on s. 25 of the Coal Industry Nationalization Act, the preference stockholders have no right to anything beyond what they will receive under the proposed reduction of capital.

My Lords, the same conclusion results from a consideration of the authorities and especially of *Will* v. *United Lankat Plantations Co. Ld.* (1). In that case art. 43 of the articles of association provided that new shares should be issued with such priority as regards dividends or in the distribution of assets as the company in general meeting might direct. The special resolution creating new shares declared "that the "holders thereof be entitled to a cumulative preferential "dividend at the rate of 10 per cent. per annum on the amount "for the time being paid up on such shares; and that such "preference shares rank, both as regards capital and dividend, "in priority to the other shares." In the Court of Appeal it was held that the preference shareholders were not entitled in the distribution of profits to anything more than a 10 per cent. dividend. Cozens-Hardy M.R., said (2): "Sir Francis "Palmer in his book, Palmer's Company Precedents, 11th ed., "part (i), p. 814, says this 'It is generally assumed that "'where the preference shares are given a fixed preferential "'dividend at a specified rate, that impliedly negatives any "'right to take any further dividend, and probably this "'assumption is well founded.' In my opinion, that assumption is well founded." Farwell L.J., agreed. But these learned judges were careful to confine their judgments to preferential dividend rights, and Farwell L.J., said (3) that the considerations affecting capital and dividend were entirely different and that he did not think that you could reason from what will happen to capital in a winding up to what ought to happen to dividend while the company is a going concern. This House affirmed the decision of the Court of Appeal, and Viscount Haldane L.C., said (4): "I should "have thought that if we were dealing with an ordinary "case of two individuals coming together, and if a document "were produced saying 'You are to have a cumulative pre-

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(1) [1912] 2 Ch. 571; [1914] A. C. 11.

(2) [1912] 2 Ch. 571, 576.

(3) Ibid. 580.

(4) [1914] A. C. 11, 17.

"'ferential dividend of 10 per cent.' or whatever might be "the equivalent in the circumstances of the bargain, it would "be naturally concluded that that was the whole of the "bargain between the parties on that point. You do not look "outside a document of this kind in order to see what the "bargain is; you look for it as contained within the four "corners of the document." Later in his judgment he adds this (1): "I think that Farwell L.J., called attention to what "is really a cardinal consideration in this matter. Shares "are not issued in the abstract and priorities then attached "to them; the issue of shares and the attachment of priorities "proceed uno flatu; and when you turn to the terms on which "the shares are issued you expect to find all the rights as "regards dividends specified in the terms of the issue." With this opinion Earl Loreburn and Lord Atkinson agreed. My Lords, the ratio decidendi applies with equal force to priorities of participation in the company's property, and I see no ground on which it may be supposed that the declaration of rights as regards dividends is exhaustive, but the declaration of rights as regards property is not exhaustive. There is as good reason and it is equally easy to define exhaustively the one set of rights as the other. Sargant J., in *In re National Telephone Co.* (2) said: ". . . . it appears to me that the "weight of authority is in favour of the view that, either with "regard to dividend or with regard to the rights in a winding "up, the express gift or attachment of preferential rights to "preferential shares, on their creation, is, prima facie, a "definition of the whole of their rights in that respect, and "negatives any further or other right to which, but for the "specified rights, they would have been entitled." The decision of this House in *Will's* case (3) had not been pronounced when Sargant J., decided *In re National Telephone Co.* (4), and his opinion reflects his construction of the judgment of the Court of Appeal. The next case is *In re Fraser & Chalmers Ld.* (5), in which Astbury J., held that the preference shareholders in the company were entitled to participate along with other shareholders in the company's property after repayment of the capital; but he explained in the later case of *Collaroy Co. Ld.* v. *Giffard* (6) that this decision was based on the particular terms of the special resolution and he retracted what he had said in *In re Fraser & Chalmers Ld.* (5) so far as it controverted the opinion of Sargant J., in *In re National Telephone Co.* (1) which I have quoted. The last case calling for consideration is *In re William Metcalfe & Sons Ld.* (2). In that case Eve J., repudiated the idea that an express direction as to ranking in priority for return of capital excludes any further pari passu ranking on surplus property, and held that the ordinary shareholders must establish that the preference shareholders had renounced their statutory right as members of the company to share in the company's property in a liquidation. His judgment was affirmed by the Court of Appeal. With respect to the learned judges who were parties to the decision, I have felt unable to reconcile it with the ratio of the judgment in *Will* v. *United Lankat Plantations Co. Ld* (3). It is unnecessary for me to elaborate my reasons, because they are most clearly stated in the opinion of Lord Keith in the present case and I would respectfully adopt what he has there said. It is, I think, not possible to distinguish *Metcalfe's* case (2) from the present case, and I have therefore come to the conclusion that it should be overruled and that the ratio of *Will* v. *United Lankat Plantations Co. Ld.* (3) was correctly applied in *Collaroy Co. Ld.* v. *Giffard* (4) and *In re National Telephone Co.* (1).

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(1) [1914] A. C. 11, 17.
(2) [1914] 1 Ch. 755, 774.
(3) [1914] A. C. 11.
(4) [1914] 1 Ch. 755.
(5) [1919] 2 Ch. 114.
(6) [1928] Ch. 144, 158-60.

I must now turn to s. 25 of the Coal Industry Nationalization Act, and I begin with what is common ground, that the statutory jurisdiction of the court to confirm reductions of capital is not ousted. It was, however, said that the court should decline to entertain applications for confirmation of a reduction of capital in the interval between the vesting date and the settlement and payment of compensation under the Act on the ground that the declared intention of Parliament is that the interests of different classes of shareholders or stockholders shall be subject to an adjustment under regulations made by virtue of s. 25. That, I think, is in accordance with the opinion of the Lord President. I share, however, the difficulty, which the Master of the Rolls felt and expressed in his judgment in *In re Chatterley-Whitfield Collieries Ld.* (5), in appreciating what the declared intention of Parliament may be. It must be remembered that a court of law has no discretion whether it shall exercise its jurisdiction or not: "judex tenetur impertiri judicium suum." The court, therefore, cannot be moved to suspend applications for confirmation of reduction of capital in order to give place to a tribunal created by a statute which has neither clearly ousted nor clearly suspended the jurisdiction. Its duty therefore remains to consider whether the proposed reduction of capital is fair and equitable, but in discharging this duty it must have regard to the provisions of s. 25. If that section opens to the preference stockholders a prospect of advantage, of which they could be deprived only by a reduction of capital involving the extinction of their shares before liquidation, I would be prepared to hold that the reduction was unfair. But neither s. 25 nor the regulations, which have been made under it since this case was before the Court of Session, justify any firm expectation of advantage to the preference stockholders. How the regulations will be applied by the tribunal is a matter of doubtful speculation. The ordinary stockholders are not bound to await the operation of the regulations before exercising powers which are committed to them by the articles. It was conceded that the payment of a dividend which would absorb all "surplus assets" or the distribution of a bonus which would exhaust the undivided profits could not be met by an interdict based on the plea that these were oppressive abuses of powers. Why then should they hold their hand if they desire to reduce the capital in the manner proposed rather than to take part in the doubtful hazard of proceedings before a tribunal constituted under s. 25? The company is not bound to satisfy the court that its proposals are not unfair. It has brought forward proposals which are intra vires, regular on the face of them, and in conformity with the usual practice as laid down by Lord Wrenbury in his book on the Companies Acts (11th ed., p. 120). If the objectors can find in the provisions of s. 25 or of the regulations anything which should stand in the way of the court's approval, it is for them to disclose it. If they fail to do this, the court has no material before it which would warrant a finding that the proposed reduction is unfair.

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(1) [1914] 1 Ch. 755.
(2) [1933] Ch. 142.
(3) [1914] A. C. 11.
(4) [1928] Ch. 144.
(5) [1948] 2 All E. R. 593.

I would dismiss the appeal.

Lord Morton of Henryton. My Lords, the respondent company (hereafter called "the company") seeks to effect a reduction of its capital, by returning to the holders of its 40,000*l.* first preference stock and 10,000*l.* second preference stock capital to the full extent of 1*l.* in respect of each 1*l.* of such stock held by them respectively and thereby extinguishing these two stocks, and by returning to the holders of its 675,000*l.* issued ordinary stock, capital to the extent of 10*s.* in respect of each 1*l.* of such stock held by them respectively. This reduction can only be carried out subject to confirmation by the court and the court will not confirm the reduction unless it is " fair and equitable." It is this discretion, vested in the court, which properly safeguards the interests of a dissenting minority : see *British & American Trustee & Finance Corporation Ld.* v. *Couper* (1). The words " fair and equitable " are not used with any technical meaning, but " in the ordinary " sense of those words " (per Lord Macnaghten (2)).

The appellants are a dissenting minority, of no fewer than seventy-one preference stockholders, holding among them about 45 per cent. of the preference capital, and there can, I think, be no doubt that the proposed reduction is detrimental to the preference stockholders and beneficial to the ordinary stockholders. Moreover there is no reason for the proposed reduction, at this stage in the company's history, other than the desire of the ordinary shareholders to obtain a benefit for themselves, at the expense of the preference shareholders. It is for your Lordships to determine whether, notwithstanding these facts, the proposed reduction is fair and equitable in all the circumstances of the present case.

In agreement with the Lord President of the Court of Session, but in disagreement with the majority of the First Division, I have reached the conclusion that it is neither fair nor equitable. I shall first state my reasons and shall then proceed to expand them and to consider the arguments advanced at the hearing in favour of the proposed reduction. For the sake of brevity, I shall refer to the proposed reduction as " the scheme " and shall use the phrase " surplus assets " as a convenient phrase to describe the assets which remain, in the winding up of a company, when all its creditors have been paid and all the members have been repaid the amounts paid up on the capital held by them. In so using the phrase I do not forget Lord Macnaghten's observation in *Birch* v. *Cropper* (3) that the " surplus assets " are " part and parcel of the property of the " company—part and parcel of the joint stock or common " fund—which at the date of the winding up represented " the capital of the company. It is through their shares

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(1) [1894] A. C. 399, 406.
(2) Ibid. 413.
(3) 14 App. Cas. 525, 546–7.

"in the capital, and through their shares alone, that members "of a company limited by shares become entitled to participate "in the property of the company."

My Lords, my reasons for the conclusion already stated are as follows: (1.) In my view the preference stockholders have, under the company's memorandum and articles, a right to share in the surplus assets in a winding up. (2.) The company's substratum is gone and a winding up is inevitable. Thus the scheme does not serve any useful business purpose connected with the carrying on of the company. The only results which will follow from it are (*a*) The preference stockholders will forthwith cease to receive their interest at 7 per cent., instead of continuing to receive it until winding-up; (*b*) The preference stockholders will be excluded from any share in the surplus assets on a winding up. The ordinary shareholders have used their voting power in order to secure these results, and for no other purpose; there is no other reason why the company should not proceed to liquidation without taking this preliminary step. (3.) The opposition to the scheme does not come from a small or factious minority, but from a substantial minority who have excellent reasons for wishing to oppose the scheme. (4.) It is possibly of some importance that the scheme cuts out the preference stockholders from any chance of getting favourable adjustment of their interests in the company's assets under s. 25 of the Coal Industry Nationalization Act, 1946. As will appear hereafter, however, I attach very little weight to this point.

My Lords, my first reason is of great importance. If the preference stockholders are not entitled to share in the surplus assets, the scheme at once assumes a different aspect. In the Court of Session Lord Keith thought that they were not so entitled, and the question is, of course, one of construction. The respective rights of preference and ordinary stockholders depend entirely upon the company's memorandum and articles of association, to which I now turn. By cl. 5 of the memorandum the company has power to increase its capital "by "the creation and issue of new shares, either ordinary, or "having such preference, priority and special privileges "attached thereto, as may be determined by special resolution "of the company." It is, I think, unnecessary to trace the stages by which the company's capital reached its present amount. In the year 1923 the company by special resolution adopted new articles of association. Before that date, all the preference stock had been issued, and, in my view, no other document is material for determining the present rights of all classes of stockholders.

The articles must, of course, be read as a whole, and in reading them it is important to bear in mind that (to quote Lord Macnaghten in *Birch* v. *Cropper* (1)) " every person who " becomes a member of a company limited by shares of equal " amount becomes entitled to a proportionate part in the " capital of the company, and, unless it be otherwise provided " by the regulations of the company, entitled, as a necessary " consequence, to the same proportionate part in all the " property of the company." Thus in the present case the preference stockholders are entitled to share in the surplus assets with the ordinary stockholders in proportion to their respective holdings, unless the articles of the company otherwise provide.

I turn first to arts. 159 and 160, since they are the only articles which deal directly with the matter in issue, though of course they must be read in conjunction with all the other articles, in order to get a complete picture. I shall quote these two articles, as they have not yet been read in full: " 159. In the event of the company being wound up, the " preference shares (first issue) shall rank before the other " shares of the company on the property of the company, " to the extent of repayment of the amounts called up and " paid thereon. 160. In the event of the company being " wound up, the preference shares (second issue) shall rank " before the ordinary shares but after the said preference " shares (first issue) on the property of the company to the " extent of repayment of the amounts called up and paid " thereon." As these two articles are similar in their terms, mutatis mutandis, it will be sufficient to examine one of them in detail. Certainly neither of them contains any words which expressly exclude the preference stockholders from sharing in the surplus assets, although such words are very commonly found in a company's articles, and they appear, for instance, in the articles of Chatterley-Whitfield Collieries Ld., the respondent company in the next appeal before this House. The omission of any words of exclusion is, I think, somewhat significant. The new articles were adopted in 1923, and in 1919, Astbury J. had decided in the case of *In re Fraser & Chalmers Ld.* (2), that the preference shareholders in the company then in question were entitled to share in the surplus assets, pointing out that "all shareholders are entitled "to equal treatment unless and to the extent that their rights "in this respect are modified by the contract under which "they hold their shares." This was the last relevant decision before the company in the present case adopted its new articles, and I think that if it had been intended to exclude the preference shareholders from any share in the surplus assets, express words of exclusion would have been inserted in arts. 159 and 160.

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(1) 14 App. Cas. 525, 543.

(2) [1919] 2 Ch. 114.

Are there any words which raise an implication of such an exclusion? My Lords, I cannot find them. Article 159 is concerned simply with the *order* in which shares shall rank "on the property of the company," and the *extent* to which the first preference shares (now stock) shall rank before the other shares of the company. They are to rank before the other shares, on that property, to the extent of repayment of the amounts paid up. Surely the implication is that, except to the extent just stated, the preference shares are to have no priority, but are to rank equally, on any property of the company which is left after the paid-up capital has been repaid? If, however, there is no such implication, there is not a word which raises the implication that they are to be excluded from the ordinary right, as corporators, to share equally with other corporators in a winding up on this portion of "the property of the company."

Turning now to the other articles, I look in vain for any words which expressly or impliedly exclude the preference shareholder from the right just mentioned. I would first note that art. 12 has no relation to the existing preference stock, as it had all been issued before this article was adopted. I do not think it matters whether or not there was an earlier article in the same terms, as the present rights of all stockholders depend upon the 1923 articles. Counsel for the company relied particularly upon arts. 128, 139 and 141 (A). I shall have to return to these articles later, and I have no desire to minimize the marked difference between the position of the preference and the ordinary stockholders in regard to the profits, while the company is a going concern. But, with all respect to those who think otherwise, I cannot obtain from these three articles any light on the respective positions of the preference and the ordinary when the company goes into liquidation. As Lord Romer (then Romer L.J.) said in *In re William Metcalfe & Sons Ld.* (1): "Because . . . . the

(1) [1933] Ch. 142, 161.

" preference shareholders, as regards dividend, are entitled " to nothing more than the fixed preferential dividend expressed " to be given to them, it does not in the least follow that so " far as regards their rights in a winding up they are only " entitled to the privileges of preference expressly given to " them in that respect." In order to find out how the company's property is to be dealt with when that event happens, one has to return to the articles dealing with the position in a winding up. I have already dealt with arts. 159 and 160, and, having travelled full circle, I have discovered nothing which expressly or impliedly deprives the preference stockholders of their ordinary right as corporators to share in the surplus assets in a winding up.

My Lords, I hope and believe that I have avoided approaching this question of construction " with any obsession or " preconceived idea as to the inherent equality between " shareholders in a company " to quote again Romer L.J. in *Metcalfe's* case (1). I have construed the memorandum and articles with an entirely open mind, and having construed them I fall back upon that inherent equality which is, to my mind, in no way disturbed by the regulations of the company.

I leave the articles by asking, and answering to the best of my ability, two questions: (*a*) What would have been the position as to the distribution of the company's property on a winding up, if the articles had contained no provisions at all as to how that property was to be distributed ? In that event there could, I suppose, be no doubt that the balance remaining after payment in full of the creditors would have been divisible equally among all the stockholders, preference and ordinary alike, under ss. 211 and 247 of the Companies Act, 1929. See *Birch* v. *Cropper* (2). (*b*) To what extent is the position altered by the memorandum and articles of this company ? Answer—The only provisions as to this are contained in arts. 159 and 160, and they do no more than confer a priority on the preference stockholders " to the extent " of " repayment of their capital.

My Lords, in every case the answer to the question now under consideration depends upon the true construction of the regulations of the company in question. I am, however, strengthened in the view which I have formed by the closely reasoned judgment of Eve J., in *Metcalfe's* case (3), unanimously

(1) [1933] Ch. 142, 159–60.
(2) 14 App. Cas. 525, 546–7.
(3) [1933] Ch. 142, 144–5.

Lord Morton of Henryton.

accepted by the Court of Appeal as correct. There are, of course, differences, in the wording of the memorandum and relevant articles, between the present case and *Metcalfe's* case (1). The articles are very shortly set out in the report, which does not show whether or not there were any articles on the same lines as arts. 128, 139 and 141 (A) ; but Mr. Stamp argued (1) " the moment before the winding up the ordinary " shareholders could have passed a resolution dividing the " whole of the surplus assets or accumulated profits between " them " and this argument is dealt with by Eve J. (2). I think therefore that any distinction which exists between the present case and *Metcalfe's* case (1) must be an extremely fine one. *Metcalfe's* case (1) settled, so far as regards the Court of Appeal, a long-standing difference of judicial opinion which is fully set out in the judgments. It is not binding on your Lordships' House, but in my view the decision, and the reasoning on which it was founded, were correct. I also agree with the reasoning and the decision in the case of *Williamson-Buchanan Steamers Ld.* (3).

I have not overlooked the case of *In re Bridgewater Navigation Co.* (4). If the preference stock were to continue in existence until liquidation, interesting questions might arise whether that case was rightly decided, and if so whether the facts of the present case would support any claim by the ordinary stockholders similar to the claim successfully put forward in the *Bridgewater* case (4). I do not, however, find that case, in which the facts were of a very special nature, of any assistance on the question of construction which arises in the present case.

It is, of course, necessary to consider carefully the decision of this House in *Will* v. *United Lankat Plantations Co. Ld.* (5). I would observe first that the House was then dealing only with a question as to the rights of the preference shareholders, in respect of dividend while the company was a going concern, but certain observations of Lord Haldane were much relied upon by counsel for the company. My Lords, for my part, I do not think that Lord Haldane was addressing his mind in the slightest degree to the rights which the preference shareholders would have in a winding up. These rights were not in dispute in this House. See *Collaroy Co. Ld.* v.

(1) [1933] Ch. 143, 144–5.
(2) Ibid. 151–2.
(3) (1936) S. L. T. 106.
(4) [1891] 2 Ch. 317.
(5) [1914] A. C. 11.

Giffard (1). Lord Haldane was delivering an impromptu opinion upon one topic only, and I do not think he intended his words to be applied to any other topic. The other noble and learned Lords also concentrated on the topic with which alone the case was concerned. I cannot form any idea what view the House would have taken if the rights of the preference shareholders to surplus assets in a winding up had been under consideration. I am supported in my view that *Will's* case (2) is of no assistance in the present problem by the following facts: (*a*) When *Will's* case (3) was heard in the Court of Appeal Cozens-Hardy M.R. clearly thought that the preference shareholders would share in surplus assets in a winding up (4) while Farwell L.J. said (5): "To my mind the considerations "affecting capital and dividend are entirely different. The "preference given to capital is in the winding up, and the "preference claimed to be given to dividend here is in a "going concern; and I do not think that you can reason "from what will happen to capital in a winding up to what "ought to happen to dividend while the company is a going "concern. As to what may happen in a winding up I express "no opinion. Sir Francis Palmer says this, immediately "following the passage read by the Master of the Rolls, in "Palmer's Company Precedents, 11th ed., pt. I, p. 814: "'Where preference shares are given a preference as regards "'capital, that does not impliedly exclude them from sharing "'in the surplus assets in winding up, after clearing off the "'whole of the paid-up capital: *In re Espuela Land and* "'*Cattle Co.* (6). It is therefore open to contention that the "'attachment of a preferential dividend does not impliedly "'exclude the right to participate in surplus profits after "'paying a like dividend on the subordinate shares. In "'order, however, to preclude any question on this point, "'it has for some time past been customary to insert express "'words negativing the right of preference shareholders to "'participate in further profits'." If this House, in affirming the Court of Appeal, had disagreed with these observations, it would seem likely that some member of the House would have criticized them. The absence of any such criticism may indicate that their Lordships either formed no view upon the observations of the Master of the Rolls and Farwell L.J.

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(1) [1928] Ch. 144, 154.
(2) [1914] A. C. 11.
(3) [1912] 2 Ch. 571.
(4) Ibid. 578 ab init.
(5) Ibid. 580.
(6) [1909] 2 Ch. 187.

or agreed with those observations. (*b*) In *Metcalfe's* case (1) all the members of the Court of Appeal mentioned *Will* v. *United Lankat Plantations Co. Ld.* (2), and clearly did not think it contained anything adverse to the reasoning of Eve J. (*c*) It may possibly be material to note that in *Will's* case (2) this House had to consider the joint effect of the second resolution of July 13, 1891, which (to quote Lord Haldane (3)) " gave the authority to make the bargain and defined the " terms which the bargain was to contain " when the preference shares were issued, and the articles of the company, in particular art. 43. In the present case the first preference shares were created in 1878, and the second preference shares in 1892 and the present rights of the shareholders are defined by the articles adopted in 1923. Your Lordships do not know, nor, in my view, is it now material to know, what were the terms of the original offer of preference shares at the time when they were created.

For these reasons, my Lords, I am of opinion that the preference shareholders in the present case are entitled to share in the surplus assets, and that the authorities furnish no good ground for a contrary conclusion.

I now come to my second reason for thinking that the scheme is unfair and inequitable, and I should like to adopt, respectfully, the summary of the situation given by the learned Lord President (4) : " What are the admitted facts ? This " company's capital structure consists of preference and " ordinary stock in the ratio of roughly 1 to 13. Its business " was coal-mining, and on January 1, 1947, its collieries and " working assets passed to the National Coal Board in exchange " for a share, as yet undetermined, in the global sum of com- " pensation. Liquidation is inevitable. The company's sub- " stratum is gone. Its remaining assets, consisting of " investments and cash, can no longer be employed in prosecut- " ing the objects for which it was formed. No resumption " of business is in contemplation. It survives, with one foot " in the grave, solely for the purposes of being wound up, and " it will be wound up as soon as the compensation has been " ascertained. There is no question in this case, as in earlier " cases, of recasting the company's finances in its interests " as a trading entity. There is no question here of discre- " tionary forecasts of business men as to the company's

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(1) [1933] Ch. 142, 157, 159, 161.

(2) [1914] A. C. 11.

(3) [1914] A. C. 16.

(4) 1948 S. C. 360, 377.

H. L. (Sc.)

1949

Scottish Insurance Corporation Ld. v. Wilsons & Clyde Coal Co. Ld.

Lord Morton of Henryton.

"commercial future. This company's future is behind it. "Its creditors are provided for. There is only one active "controversy, viz., the division of the assets amongst the "shareholders. These assets, even without taking into "account the compensation from the National Coal Board, "are 'much more than sufficient' to meet all liabilities, and "a glance at the balance sheets is enough to show that in the "end of the day there are bound to be considerable surplus "assets. Faced with this situation (which must have a "parallel in many other concerns affected by nationalization "of the industries in which they have previously been engaged), "this company determined to wind up by instalments "and to die by inches. On September 26, 1947, a special "resolution was passed (by a majority) reducing the capital "from 850,000*l*. to 462,000*l*. by returning capital to the share-"holders to the extent of 388,000*l*., described as being in "excess of the wants of the company, as it manifestly is. "Had this return of capital been effected rateably, no objec-"tion could have been stated. But the proposal is to pay "off the whole preference stock at par and to return 10*s*. in "the *l*. to the ordinary stockholders, who, if the scheme is "approved, will be left in undisputed possession of the field. "In answer to a protest on behalf of the preference stock-"holders, the secretary of the company wrote on September 17, "1947: 'In view of the passing of the Coal Industry Nationali-"'zation Act, 1946, the liquidation of this company sooner "'or later is inevitable. The proposed reduction of capital "'is only *the first step in that direction*, the directors being "'unwilling to proceed with *formal liquidation* until further "'progress has been made with the adjustment of the com-"'pany's claims . . . .' (The italics are mine.) Confirma-"tion is now opposed not by a single obstructive shareholder "or a small coterie of dissentients, but by seventy-one pre-"ference stockholders holding 45 per cent. of the preference "stock." Later, the Lord President said (1): "If it were not "anticipated by both parties that there will be a substantial "surplus after repaying to all the shareholders their sub-"scribed capital—and on the accounts this anticipation is "plainly well-founded—this case would be academic. Both "parties see that, if there is no 'first step' of a reduction of "capital to extinguish the preference stock at par, the surplus "assets will have to be divided between all the shareholders,

(1) 1948 S. C. 378.

"whereas if this reduction is confirmed, the whole of the "surplus assets will be appropriated by the ordinary stock-"holders and the preference stockholders will get nothing "but the par value of their stock. The ordinary stockholders "have used their voting predominance with the object of "cutting the preference stockholders out, and the question "for us is whether in the circumstances that is, in a business "sense, fair and equitable." Finally, he observed (1): ". . . . it can make no appreciable difference to these "ordinary stockholders whether they get 10s. in the *l.* now at "the 'first step' in the winding up, or whether the relative "investments continue to be held by the company until the "'formal liquidation.' On the other hand it is impossible "on any business view of the matter to see how in the inevitable "liquidation the preference stockholders could ever get less "than 20s. in the *l.* for their stock; and if they are forced to "accept 20s. now and to forgo their right to a 7 per cent. "dividend and to participation in the surplus assets in the "liquidation, they are being bought off for less than a just "equivalent, and this loss is being inflicted upon them not "in the interests of the company but solely in order that the "ordinary stockholders may eventually appropriate 13-13ths "of the surplus assets instead of 12-13ths. This is not my "idea of what is just or equitable, and I do not believe that "any jury of business men would so regard it."

My Lords, these passages express so clearly my own views on this branch of the case that I would only add this—there is no question, in the present case, of a "continuing burden" on the company in paying the dividend on the preference stock. Winding up is inevitable, the sum required to pay this dividend only amounts to 3,500*l.* gross per annum, and this sum cannot seriously be regarded as a burden, having regard to the free assets of the company and the "interim income" provisions of the Act of 1946.

My third reason, as to the nature of the opposition to the scheme, is also dealt with in the passages quoted above. I would only add that it is not of course to be supposed that the holders of the remaining 55 per cent. of preference stock support the scheme, merely because they have not appeared in these proceedings. Indeed, I find it difficult to imagine that any well-informed preference stockholder would support the scheme, unless he were also a still larger holder of ordinary stock.

(1) 1948 S. C. 378, 380.

I do not place much weight on my fourth reason, because it is impossible to foretell with any accuracy what (if any) adjustment of interests will ultimately be made under s. 25 of the Act of 1946, if the preference stock continues in being. There may be cases in which it can be said that adjustments will probably be made in favour of preference stockholders, but I am not satisfied that this is such a case. The existence of s. 25 is, I think, of little importance in the present case, one way or the other. It certainly cannot be regarded as suspending the power of the court to approve a reduction of capital ; it is merely a circumstance to be taken into account when the court is exercising its discretion.

My Lords, I now turn to the reasons urged by counsel in favour of the scheme. First, it is said that it is the ordinary practice, where money is to be returned to the shareholders in a company, to return it in the same manner as capital is repayable in a winding up. Counsel referred, as part of his argument, to a passage in Buckley on the Companies Acts, 11th ed., p. 120, which has appeared in a number of editions of that work, including at least one which Lord Wrenbury himself prepared. There is a striking lack of authority on this point, but I would agree that in an ordinary case, where a company is intending to carry on business and desires to pay off any paid-up share capital under s. 55 of the Act of 1929, the practice is as stated in Buckley. It is still necessary, however, for the court to consider with care in each case whether a scheme is fair and equitable in the circumstances of that particular case. It is not enough for those supporting a scheme to say " the company is still in being and the proposed " repayment is in accordance with the ordinary practice." If that were enough, the court's discretion would be cut out and the ordinary shareholders would be able to treat preference shares as being redeemable, at their option, as soon as sufficient capital, in excess of the wants of the company, became available for the purpose. The practice can, at most, have the effect of making it necessary for objectors to point to some circumstances which distinguish the case under consideration from the ordinary run of cases. Here they can point at once to the taking over of the company's business by legislative action, the imminence of liquidation, and the absence of any reason, from the standpoint of the company's business, for any repayment of capital at this stage. Thus, I think that the practice in question is of little assistance to the respondent company's argument. The ordinary stockholders are, in effect, seeking to use to the detriment of the preference stockholders a priority in respect of capital which was intended to be for their benefit. I would call attention, on this point, to the contrast drawn between the position of a company intending to continue its business and a company whose business is at an end, in the judgment of the Master of the Rolls in *In re Chatterley-Whitfield Collieries Ld.* (1) which your Lordships are about to consider. The considerations which make the practice prima facie a fair and convenient one in the former case have no application in the latter case.

Next, reliance is placed on art. 139, and in particular on the power expressly given to the directors to set aside, out of the profits, a reserve fund to be used, inter alia, "for making "provision for paying off the preference share capital." This provision formed, I think, the basis for Lord Russell's approval of the scheme, but, with all respect, I feel that he gave too little weight to the fact that this article gave the ordinary stockholders no contractual right to pay off the preference. If and when provision had been made for this purpose, it would still have been necessary to bring the proposal before the court for its confirmation or rejection. In this House it was argued that this article "gave warning" to the preference stockholders that they might be paid off some day, and therefore they could not properly complain if this event happened. No doubt any stockholder who read art. 139 would be given this warning. But, in the case of every company whose articles contain no provision as to the redemption of its preference shares, every preference shareholder who reads s. 55 of the Act is given warning that, subject to confirmation by the court, a scheme may provide for the payment off of his shares. The preference stockholders in this company are in exactly the same position; they may be paid off if the court, in its discretion, thinks fit, and they will not be paid off if the court does not think it fair and equitable. I cannot see why the existence of this "warning" in art. 139 should be of any real assistance to this House in deciding the question whether payment off, *in the present circumstances*, is fair and equitable. It may not be irrelevant to note that no funds have ever been set aside for the express purpose of paying off the preference stock, which has stood at the figure of 50,000*l.* for over 50 years. I think that the Lord President was

(1) [1948] 2 All E. R. 593.

justified in observing (1) that but for the "Act of 1946 the "investment would in all human probability have continued "to yield seven per cent. for an indefinite time."

Lastly, and this is, I think, the point which was most strongly pressed, it is said that there can be nothing unfair or inequitable about the scheme, because the profits (after payment of the preference dividend) are divisible among the ordinary stockholders under art. 128; any surplus assets are due to the abstinence of the ordinary shareholders as regards dividends in the past, and the ordinary stockholders could now, if they thought fit, use their voting power to divide the surplus assets among themselves, either (*a*) by declaring a vast ordinary dividend under art. 129 or (*b*) by capitalizing all undivided profits under art. 141 (A) and distributing the resulting capital among themselves by way of bonus. My Lords, I was at first impressed by this argument, but I have come to the conclusion that it is of little weight. Article 128 merely expresses that which is the ordinary rule in companies having preference shares, and no doubt there were good reasons, from the point of view of the company's business, why no larger ordinary dividends were paid in the past. Now comes an event, imposed on the company from without, which puts an end to the company's business. The fact that there are surplus assets arises partly from this event and only partly from the past abstinence of the ordinary stockholders. I have already said why I think it would be unfair if the preference stockholders were now cut out by the proposed reduction of capital. In my view it would also be unfair if at this stage the ordinary stockholders were to adopt either course (*a*) or course (*b*) already mentioned. It is quite true that they have a contractual right to do so, but it is easy to think of many cases in which it becomes unfair for a man to exercise a contractual right in a particular way; cases in which some unexpected event happens, giving rise to a state of circumstances utterly different from that which the parties contemplated. In the present case, nationalization has come upon the company and has made liquidation inevitable. The preference stockholders are about to lose an investment which they would have liked to keep; the ordinary stockholders would probably have preferred the company's business to continue. In these circumstances it does not avail the ordinary stockholders to say: "This scheme is not unfair, because we could have

(1) 1948 S. C. 360, 378.

H. L. (Sc.)

1949

SCOTTISH INSURANCE CORPORATION LD. *v.* WILSONS & CLYDE COAL CO. LD.

Lord Morton of Henryton.

"achieved the same result by employing either of two other "methods." I would reply: "Be it so; the adoption of "either of these two methods would be unfair. It may be "that the court could not prevent you from achieving your "ends by either of these methods, but you have chosen a third "method which gives the court a discretion to stop you, "and you will be stopped."

For these reasons I do not think that your Lordships' decision should be affected by the "alternative methods" argument. The only question before you is in regard to this particular scheme for getting rid of the preference shareholders. Is it fair and equitable or not? I think it is not. I would allow the appeal, with the result that the company's petition for confirmation of the reduction of capital would meet with the fate which, in my view, it richly deserves, that of dismissal with costs.

Appeal dismissed.

Solicitors for appellants: *Parker, Garrett & Co., for J. & R. A. Robertson W. S., Edinburgh.*

Solicitors for respondents: *Allen & Overy for Shepherd & Wedderburn W. S., Edinburgh, and McGregor, Donald & Co., Glasgow.*

H. L. (E.)*

1949

Mar. 3, 7; *May* 6.

[HOUSE OF LORDS.]

PRUDENTIAL ASSURANCE CO. LD. AND ANOTHER . . . . . APPELLANTS;

AND

CHATTERLEY-WHITFIELD COLLIERIES LD. . . . . RESPONDENT.

Company—Reduction of capital—Colliery company—Nationalization of industry—Shareholders' rights—Preference and ordinary shares—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 55, *sub-s.* 1*—Coal Industry Nationalization Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 59), *s.* 25.

Under the Coal Industry Nationalization Act, 1946, the undertaking of a colliery company carrying on business in England became vested in the National Coal Board, subject to the payment of compensation, the amount of which had not yet been assessed. The company intended thereafter to carry on a colliery business in Eire and Northern Ireland and engaged in prospecting with that end in view. Its capital being considered larger than was required, it was proposed to reduce it by paying off, out of reserves, the whole of the preference capital. By art. 7 of the articles of association the holders of preference shares had the right, in the event of a winding up of the company, to repayment of capital in priority to the claims of the holders of ordinary shares but they were given no other rights to participate in the assets of the company.

**Present*: VISCOUNT MAUGHAM, LORD SIMONDS, LORD NORMAND and LORD MORTON OF HENRYTON.

Held, that the reduction proposed was fair and equitable and should be confirmed and that there was no ground to suppose that under s. 25 of the Act of 1946 that preference shareholders might receive anything more than they would have been entitled to receive in a liquidation.

Decision of the Court of Appeal (sub nom. *In re Chatterley-Whitfield Collieries, Ld.*) [1948] W. N. 367, affirmed.

APPEAL from the Court of Appeal (Lord Greene M.R. and Asquith L.J., Evershed L.J. dissenting.)

This was an appeal from an order of the Court of Appeal dated July 30, 1948, reversing an order of His Honour Judge Peel K.C. (sitting as the Deputy of the Vice-Chancellor of the County Palatine of Lancaster) dated May 4, 1948, whereby he dismissed a petition presented to the Court of the County Palatine of Lancaster by Chatterley-Whitfield Collieries Ld., the respondent company, under s. 55 of the Companies Act, 1929, for confirmation of the reduction of the capital of the company by repayment of the whole of its preference capital. The appellants, Prudential Assurance Co. Ld. and Yorkshire Insurance Co. Ld., who were preference shareholders, opposed the petition and now appealed to the House of Lords. The facts are fully stated in the opinion of Lord Simonds.

Sir Cyril Radcliffe K.C., *Ungoed-Thomas K.C.* and *Raymond Walton* for the appellants.

Christie K.C. and *Eric Griffith* for the respondent company.

Their Lordships took time for consideration.

May 6. VISCOUNT MAUGHAM. My Lords, the facts in this appeal are sufficiently stated in the speech of my noble and learned friend Lord Simonds and no useful purpose would be served by my repeating them. It is not in dispute that if the company had thought fit to pass a voluntary resolution for a winding up or to do so in the near future the rights of the preference shareholders (apart from any possible action by the Tribunal appointed under s. 25 of the Coal Industry Nationalization Act, 1946) would be to receive a repayment of their share capital together with any arrears of preference dividend and they would have no other right to participate in the assets of the company. The unusual position is that the appellants as holders of a substantial number of preference shares object to the proposed reduction of capital by a repayment in full of their preference capital. Desiring to retain their preference shares though the undertaking of the company has been entirely changed, they invite the court to hold that the proposed repayment is unfair and inequitable and that the reduction ought not therefore to be approved. They acquired their shares on the footing that, subject no doubt to the approval of the court, they might be paid off under art. 43; but this they urge at the Bar is not the occasion or the method which should be adopted for such a reduction. They perhaps wisely do not tell us when that course would in their view be appropriate.

My Lords I do not propose to restate the grounds on which the majority in the Court of Appeal or my noble friends in this House have declined to accept this contention; but I should like to add a few observations of my own; for the simplest arguments sometimes escape attention merely because they are assumed. In the present case the main fact is that the undertaking of the company has been compulsorily acquired by the National Coal Board under the Coal Industry Nationalization Act. There is no longer therefore any reason for the retention by the company of the assets and funds of great value which have been slowly added to year by year with a view to meeting contingencies or spending enormous sums in improving or reconstructing or enlarging the colliery undertaking. The obvious thing to do would be to wind up and distribute all the assets after paying debts and liabilities in accordance with the articles. It is not I think suggested that the holders of preference shares could properly object to such a course. They would cease to own a well-secured 6 per cent. investment, and the ordinary shareholders would no longer possess shares paying in recent years double that amount in dividend. The object of the Coal Industry Nationalization Act was not of course the benefit of shareholders, but if we ask whether in this case preference or ordinary shareholders are the most injured by the transfer, subject to compensation, of the colliery undertaking to a State enterprise, I think the current view of commercial men would probably be that the ordinary shareholders are the greater victims.

The company, however, does not propose to go into liquidation, at any rate at present, but to embark on two entirely new ventures in Eire and Northern Ireland, one of them a new colliery, if prospective operations should prove satisfactory, and the other the business of digging for clay and the manufacture of tiles and like articles. The working capital necessary for those enterprises is only a fraction of the available existing funds of the company ; accordingly the special resolution duly passed by the company in general meeting on October 30, 1947, provided for the reducing the capital of the company from 400,000*l.* to 200,000*l.* by returning to the preference shareholders the amounts paid up on their shares. It is in my opinion from the point of view of those shareholders an accidental circumstance that a large majority of the ordinary shareholders have approved of the starting of two entirely new and it may be highly speculative enterprises with which the preference shareholders, if the reduction goes through, will obviously have no concern. If the preference shares are not paid off, and the new undertaking proved to be a success, the preference shares would become more and more valuable as the assets of the company became increasingly substantial. If on the other hand the undertaking were unsuccessful, those shares might nevertheless be worth par in a winding up while the ordinary share might have become valueless. The risk in short would be the risk of the ordinary shareholders, whilst the gain might well be that of the preference shareholders. That proposal does not commend itself to me as a fair one ; and the same objection, with smaller figures affected, must apply to a proposal for a pari passu reduction of the ordinary and the preference shares. In short, like my noble friend Lord Simonds, I am at a loss to see what other method of reduction is to be preferred as more fair and equitable in the circumstances of this case.

The question of the effect of s. 25 of the Coal Industry Nationalization Act on the present case is one with which your Lordships have dealt in the very recent case of the *Scottish Insurance Corporation Ld.* v. *Wilsons & Clyde Coal Co. Ld.* (1).

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(1) Ante p. 462.

That was also the case of a company whose undertaking was a colliery ; and the dispute, as here, was between two classes of shareholders ; but that company proposes to go into liquidation as soon as the amount of compensation payable under the Coal Industry Nationalization Act has been ascertained, and the preference shareholders were claiming (but unsuccessfully) to be entitled to rank equally in the winding up with the ordinary shareholders in the surplus assets of the company, that is, in the assets available after payment of debts and liabilities and the amounts of capital paid on the ordinary and preference shares. Counsel for the preference shareholders there, as here, relied on s. 25 of the Coal Industry Nationalization Act and said that the proposed reduction of capital deprived the preference shareholders of their right to an adjustment of their interest in the company's assets. Your Lordships have now dealt with the appeal in that case and have considered the regulations which have now been made under s. 25. They have held that there was no ground in that case for postponing the decision of the court on the petition before the court ; and they were not persuaded that there was good reason for thinking that the apparent fairness of the proposal before the court would be affected or displaced by any order which was in the least likely to be made under the jurisdiction derived from s. 25. The reduction here proposed, in my opinion, is in itself fair and equitable, and there is here, as in the previous case, no real ground for the speculation that the Tribunal might give the preference shareholders anything more than they would become entitled to receive in a liquidation.

In my opinion therefore this appeal should be dismissed with costs.

LORD SIMONDS. My Lords, this appeal is from an order of the Court of Appeal reversing an order of His Honour Judge Peel sitting as the Deputy of the Vice-Chancellor of the County Palatine of Lancaster. That learned judge had dismissed a petition presented by Chatterley-Whitfield Collieries Ld., which I will call " the company," under s. 55 of the Companies Act, 1929, for confirmation of the reduction of its capital by repayment of the whole of its preference capital. The Court of Appeal (Lord Greene M.R. and Asquith L.J., Evershed L.J. dissenting) reversed his decision and confirmed the reduction. Hence this appeal by two large holders of preference shares. Apart from a question that arises under s. 25 of the Coal Industry Nationalization Act, 1946, which I will call "the Coal Act," the case is, I think, free from difficulty.

The company was incorporated in 1891 with the principal objects of acquiring certain properties from the North of England Trustee Debenture & Assets Corporation Ld. and carrying on the business of colliery proprietors, and since its incorporation its principal business has been that of a colliery undertaking in Staffordshire. It is a private company. Clause 5 of the company's Memorandum of Association provides that the capital is 400,000*l.* divided into 40,000 shares of 10*l.* each with power to increase the same and to issue any shares with any preference or priority. The capital has at all times been 400,000*l.* divided into 40,000 shares of 10*l.* each, of which 20,000 are preference and 20,000 ordinary shares. All the shares have been issued and are fully paid. The preference shares were issued and fully paid many years ago; the ordinary shares were also issued many years ago, but the final call of 2*l.* 10*s.* per share was not made in respect of them until 1939. The present articles of association of the company were adopted by special resolution on April 28, 1944. I think it necessary to mention a few of them. By art. 7 (which in effect replaced one of the original articles) the holders of preference shares have the right to a fixed cumulative preferential dividend at the rate of 6 per cent. per annum upon the amount paid up thereon, and, in the event of the winding up of the company, to repayment of capital together with any arrears of dividend down to the date of such repayment in priority to the claims of the holders of ordinary shares but have no other right to participate in the assets of the company. Article 43 empowers the company by special resolution to reduce its capital in any manner authorized by law: art. 65 provides that on a show of hands every member present in person shall have one vote and that on a poll every member present in person or by proxy shall have one vote for every share held by him: art. 109 provides for the creation of a reserve fund which may be used for any purpose for which the net profits of the company may lawfully be used.

On January 1, 1947, the company's colliery undertaking vested in the National Coal Board under the provisions of the Coal Act. The company thereupon became entitled to receive

H. L. (E.)

1949

Prudential Assurance Co. Ld. v. Chatterley Whitfield Collieries Ld.

Lord Simonds.

from the Crown a sum by way of compensation for the expropriation of its property. The major part of this sum, which is to be ascertained by means of (*a*) the ascertainment by arbitration of the value of the assets of the industry as a whole, (*b*) the division of the sum so ascertained by award of a Central Valuation Board among the several mining districts in the country, and (*c*) the division by awards of District Valuation Boards of each district's share among the colliery owners of the district, will ultimately be satisfied by an issue of Government Stock. On the other hand the compensation to be paid in respect of certain assets such as stores and coal stocks is payable in cash. It is further provided by the Coal Act that interim income is payable by the Crown at a prescribed rate for the first two years after the vesting date, and that thereafter the colliery owner shall be entitled to interest on the sum ultimately found due to him, also at a prescribed rate, but such interest is not payable until the compensation is finally paid. Before I further examine the impact of these provisions on the affairs of the company I will say a few words about its history.

From the time of its incorporation the company carried on its colliery business with a considerable measure of success. It earned large profits and, after paying the 6 per cent. preference dividend, was able during the 12 years before nationalization to pay an average dividend of 12 per cent. on its ordinary shares and to build up a substantial reserve fund and to carry forward a very large sum on January 1, 1947. The profits in the last year of working were exceptionally large, but the picture as a whole is of a successful and prosperous company which had been conservative in its financial policy and could look to the future with confidence. The main undertaking of the company has now gone, but it does not propose to go into liquidation. It intends to carry on coal mining in Northern Ireland, if the prospecting in which it is now engaged proves successful, and also through a subsidiary company to carry on the business of digging for clay and manufacturing drain pipes and other articles. But there is no dispute that the effect of nationalization, with its provision for compensation in cash and in stock, is to leave the company with liquid assets far in excess of its needs. It is therefore the natural and obvious course for it to pursue to reduce its capital by repayment of some part of its share capital. I do not understand that this proposition is disputed by the appellants. It is the proposed method of reduction that is challenged.

On October 30, 1947, a meeting of the company was held at which a resolution was passed as a special resolution for reducing the capital of the company from 400,000*l*. to 200,000*l*. by returning to the holders of 20,000 preference shares the capital paid up thereon. 30,217 votes were cast for the resolution and 6,000 against it. Some attempt has been made to analyse the votes cast for the resolution in order to show that, with few exceptions, those who so voted either held ordinary shares only or had a greater interest in ordinary than in preference shares. I do not intend to pursue this matter, which would, I think, only be of importance, if the preference shareholders made out a prima facie case that the result was in any way unfair to them and such as could only have been reached by the influence of some improper or, at least, extraneous consideration. But this is far from being the case, for, apart from the special element introduced by the Coal Act, I am wholly at a loss to see what other method of reduction is to be preferred as more fair and equitable. Lord Greene M.R. has stated in language, on which I cannot hope to improve, the principles upon which the court has acted and should continue to act in its discretionary jurisdiction to confirm or refuse to confirm a reduction of capital. (In accordance with those priniples the reduction of capital, in this case by repayment of the preference shareholders, is fair and equitable and proper to be confirmed, unless the Coal Act induces a different conclusion.)

In the recent case, which has been appealed to this House from the Court of Session, your Lordships have had to consider the incidence of s. 25 of the Coal Act upon the jurisdiction of the court in company matters and I would not repeat at length what I said in that case. It was conceded at the Bar that the jurisdiction of the court is not ousted, but the practical result of the able argument of counsel for the appellants would be to require the court to hold its hand in every case, in which a party interested, ordinary or preference shareholder, or, I suppose, debenture holder, might possibly apply to the tribunal which is to be set up under the Act. A simple reduction of capital, a more complicated scheme of arrangement even, I think, a debenture holder's action, where a colliery undertaking is involved, must await the deliverance of the tribunal. Neither s. 25 nor the regulations now made under it give any guidance as to the way in which the rights of interested persons are to be adjusted and, though now in 1949 the ascertainment of the compensation payable to the company and the setting up of tribunals under the Act may be regarded as appreciably nearer than they were in 1947 when the special resolution for reduction was passed, it is not possible to give any real content to the claims of the preference shareholders or to predict when they may be adjudicated on by any tribunal. In these circumstances I am satisfied that it is the duty of the court not to postpone the consideration of a now proposed reduction, but, giving such weight as it thinks proper to s. 25, to dispose of the matter.

Dealing with the petition in this way I can see no reason for thinking that a claim by preference shareholders to be repaid more than the nominal amount of their capital has any substance in it. Counsel for the appellants, being asked to indicate the sort of adjustment that the preference shareholders might fairly claim, suggested that they might get 12*l.* for every 10*l.* of capital upon their submitting to be paid off. As I said in the recent appeal from the Court of Session, I should not wish to prejudice any similar claim that may come before a statutory tribunal. But I see no slightest justification for such a claim. Of the two elements that have to be considered, " rights of priority " and " relative expecta-" tions of income yield," the first is fully satisfied in favour of the preference shareholders by the repayment of their capital in full before any payment is made to the ordinary shareholders ; the second is more difficult to evaluate, but it is surely the ordinary shareholders whose position has been prejudiced by the expropriation of the company's property. The preference shareholders may or may not eventually find a 6 per cent. investment for their money : probably they will not. But it is in the highest degree unlikely that the ordinary shareholders will receive an income commensurate with what they might reasonably have expected, if the Act had not been passed. It is therefore, to put it at the lowest, so unlikely that the preference shareholders can get anything more than the full amount of their capital returned to them, that the court should not depart from its well-known and familiar practice in dealing with a petition to confirm a reduction of capital. This practice would, as I have already pointed out, lead to a confirmation of the reduction proposed in this case.

I am of opinion, therefore, that this appeal should be dismissed with costs.

H. L. (E.)

1949

PRUDENTIAL ASSURANCE CO. LD.
v.
CHATTERLEY-WHITFIELD COLLIERIES LD.

LORD NORMAND: My Lords, I agree with the opinions delivered by my noble and learned friend on the woolsack and by my noble and learned friend Lord Simonds. I would only add that the judgment pronounced today in the case of *Scottish Insurance Corporation Ld.* v. *Wilsons & Clyde Coal Co. Ld.* (1) in my opinion necessarily leads to the conclusion that the appeal in this case fails.

LORD MORTON OF HENRYTON: My Lords, your Lordships have just decided, with only one dissentient, that the proposed reduction of the capital of Wilsons & Clyde Coal Co. Ld. is fair and equitable. The reasons which led your Lordships to that conclusion seem to me to apply with even more force to the circumstances of the present appeal, and I therefore concur in the motion proposed.

Appeal dismissed.

Solicitors for appellants: *Slaughter & May.*
Solicitors for respondents: *Baddeley, Wardlaw & Co.*

(1) Ante p. 462.

[PRIVY COUNCIL]

J. C.*

1949

July 28.

MOHANLAL HARGOVIND OF JUBBULPORE, MESSRS. . . . . APPELLANTS;

AND

COMMISSIONER OF INCOME TAX, CENTRAL PROVINCES AND BERAR, NAGPUR . . . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT AT NAGPUR.

Revenue—Income tax—Allowance—Manufacture of country made cigarettes—Contractual right to pick and remove tendu leaves—Payment wholly and exclusively for purposes of business—Revenue expenditure—Deductible—Indian Income-tax Act (XI of 1922) *(as amended by the Indian Income-tax (Amendment) Act,* 1939), *s.* 10, *sub-s.* 2 *(xii).*

**Present:* LORD GREENE, LORD MORTON OF HENRYTON and SIR JOHN BEAUMONT.

J. C.

1949

MOHANLAL HARGOVIND OF JUBBULPORE, MESSRS. *v.* COMMISSIONER OF INCOME TAX, CENTRAL PROVINCES AND BERAR, NAGPUR.

By s. 10, sub-s. 2 (xii), of the Indian Income-tax Act, 1922, as amended by the Indian Income-tax (Amendment) Act, 1939, in computing the profits and gains of a business for the purpose of assessment to income tax an allowance is to be made for " any " expenditure (not being in the nature of capital expenditure " or personal expenses of the assessee) laid out or expended " wholly and exclusively for the purpose of such business . . . . "

The appellants, who were manufacturers and vendors of country made cigarettes, which were composed of tobacco contained in leaves of a tree known as tendu leaves, obtained the tendu leaves under short term contracts with the Government and other owners of forests entered into by the appellants wholly and exclusively for the purposes of their business—to supply themselves with one of the necessary raw materials—and which simply and solely gave to the appellants the right, in consideration of a sum payable by instalments, to pick and carry away the leaves.

Held, that under the contracts, which granted no interest in land and no interest in the trees or plants themselves, it was the tendu leaves and nothing but the tendu leaves that were acquired, and that the sum paid for them was expenditure on revenue account, and not on capital account, just as much as if they had been bought in a shop. Accordingly the appellants, in computing the profits and gains of their business for income tax purposes were entitled under s. 10, sub-s. 2 (xii), of the Indian Income-tax Act, 1922, as amended, to an allowance in respect of the contractual payments for the tendu leaves.

Alianza Co. v. *Bell* [1904] 2 K. B. 666, affirmed [1905] 1 K. B. 184 and [1906] A. C. 18, and *Kauri Timber Co. Ld.* v. *Commissioner of Taxes* [1913] A. C. 771, distinguished.

Judgment of the High Court reversed.

APPEAL (No. 10 of 1948) from a judgment of the High Court at Nagpur (December 8, 1944) delivered on a reference made to it under s. 66, sub-s. 1, of the Indian Income-tax Act, 1922, by the Income Tax Appellate Tribunal, Bombay.

This appeal raised a short question as to the application of s. 10, sub-s. 2 (xii), of the Indian Income-tax Act, 1922, as amended by the Indian Income-tax (Amendment) Act, 1939, in respect of assessments on the appellants for the years 1940–1 and 1941–2. That paragraph provided that in computing profits or gains of a business for the purpose of income tax an allowance was to be made for " any expenditure " (not being in the nature of capital expenditure or personal " expenses of the assessee) laid out or expended wholly and " exclusively for the purpose of such business . . . . "

The relevant facts, which are taken from the judgment of the Judicial Committee, were as follows. The appellants carried on business at several places in the Central Provinces

J. C.

1949

Mohanlal Hargovind of Jubbulpore, Messrs. v. Commissioner of Income Tax, Central Provinces and Berar, Nagpur.

of India as manufacturers and vendors of country made cigarettes, which were known as bidis. Those cigarettes were composed of tobacco contained or rolled in leaves of a tree known as tendu leaves, which fulfilled a corresponding function in the finished cigarette to that played by a cigarette paper. The appellants obtained the tendu leaves which they required by entering into a number of contracts with the Government and other owners of forests. Two of those contracts, which were taken as typical of the rest, were included in the Record, one relating to a government forest and one to a forest belonging to the Rewa state. It was important to examine the terms of those documents. The former was dated September 5, 1939, and was made between the Divisional Forest officer on behalf of the Secretary of State in Council and the appellants' representative described as the " forest " contractor." Clause 1 identified the subject-matter of the contract, which was described as " the forest produce sold and " purchased under the agreement," as that specified in sch. 1 in the " contract area " therein indicated. By cl. 2 the quantity of the forest produce was defined as all the said produce " which may now exist or may come into existence in the " contract area which the forest contractor may remove " from the said area . . . . during the period from the 5th day " of September, 1939, to the 30th day of June, 1941." Schedule 1A provided that " the contractor shall commence " his work before the . . . . day of . . . . 193 , and shall, " to the satisfaction of the office empowered to execute the " contract on behalf of Government, make continuous and " adequate progress throughout the term of the contract." In that provision the dates, by an obvious oversight, were left in blank, but the date of commencement could not be later than December 31, 1939. In the second of the two agreements which, with certain minor differences, was substantially in the same form, the period of the operations was October 1, 1938, to June 30, 1941, and the work was to be commenced on October 1, 1938. That agreement recited an application for the grant of " the contract of collecting " and removing " tendu leaves. The grant was a grant of the right to collect and remove them from the area described. In the case of each contract a sum payable by instalments was fixed as the consideration for the grant. In the former contract the contractor was allowed to coppice small tendu plants a few months in advance to obtain good leaves and to

J. C.

1949

Mohanlal Hargovind of Jubbulpore, Messrs. v. Commissioner of Income Tax, Central Provinces and Berar, Nagpur.

pollard endu trees a few months in advance to obtain better bigger leaves.

The sum paid by the appellants under the contracts and claimed by them to be a permissible deduction under s. 10, sub-s. 2 (xii), of the Indian Income-tax Act, 1922, as amended, and admitted to have been made "wholly and exclusively "for the purpose" of the business of the appellants was disallowed by the Income Tax officer. His order was confirmed successively by the Appellate Assistant Commissioner of Income Tax, Nagpur, and by the Income Tax Appellate Tribunal, Bombay. Application was made to that Tribunal for a reference to the High Court of Judicature, Nagpur, of the question whether the appellants were entitled to the deduction in question and the High Court (Grille C.J. and Sen J.) answered that question in the negative for the reasons given by them in their judgment in another case (Miscellaneous Civil Case, No. 55 of 1943).

1949. June 22, 23. *Sir Roland Burrows K.C., Handoo* and *T. P. Naik* for the appellants. The expenditure in question was, on a true interpretation of the contracts concerned and a correct appreciation of the nature of the appellants' business, normal revenue expenditure and not "capital expenditure." It was admittedly incurred wholly and exclusively for the purpose of the appellants' business, represented the cost, and nothing but the cost, of part of the raw material used in the bidis which the appellants manufactured and sold, and was therefore a proper item to be charged against receipts in a computation of the appellants' profits and gains. By the expenditure and under the contracts the appellants did not acquire any asset, enduring or otherwise, other than supplies of raw materials used in their business, nor any interest or right in the lands concerned. The contracts did not differ in any material respect from ordinary contracts of purchase and sale of raw materials subsequently to be manufactured; the right and obligations as to entry, collection, removal, storage, etc., were merely incidental to the acquisition of the raw material. It is easy to lose one's way in the cases which were discussed in the court below, but the principle is stated in *Tata Hydro-Electric Agencies, Bombay* v. *Income Tax Commissioner* (1), where it was said: "What is 'money "'wholly and exclusively laid out for the purposes of the

(1) [1937] A. C. 685, 696.

" 'trade' is a question which must be determined upon the " principles of ordinary commercial trading. It is necessary, " accordingly, to attend to the true nature of the expenditure, " and to ask oneself the question: Is it a part of the company's " working expenses; is it expenditure laid out as part of " the process of profit earning?" The essence of the matter here is that the appellants are acquiring a substance which is a raw material required for the manufacture of their bidis. In the court below it was said that the appellants were acquiring a right or interest in land, and they appeared to think that the principle is that if it can be shown that it is an interest in land it must therefore be capital. The tendu leaves are the property of the owner of the forest; the appellants do not in any sense of the word acquire any right in the land. [On the general question as to the test to be applied in determining whether a payment is revenue or capital expenditure reference was made to *Kauri Timber Co.* v. *Commissioner of Taxes* (1), which turned to some extent on a statute not in the same form as that now in question; *British Insulated and Helsby Cables, Ld.* v. *Atherton* (2), which was a long way from the present case, but it might be observed that in that case the decision that it was not revenue expenditure was only arrived at by a majority of three judges to two: *John Smith & Son* v. *Moore* (3), which was a totally different class of case; and *Golden Horse Shoe (New), Ld.* v. *Thurgood (H. M. Inspector of Taxes)* (4), a case where the material had already been abstracted.] Whether expenditure is capital or revenue expenditure depends primarily on the nature of the business which is being carried on. Here there is an established manufacturing business, the appellants are not acquiring any property in land, or any property in trees standing on land, they are only acquiring the right to the leaves which are growing on them, and the cost has to be deducted. This is a case of looking at the substance of the transaction—that is of paramount importance—and all they are acquiring is the raw material for their business. The following Indian cases have been decided since this case was before the High Court: *In re Parma Nand Haveli Ram* (5); *Commissioner of Income Tax, Punjab* v. *Bhojraj Harichand* (6);

(1) [1913] A. C. 771.
(2) [1926] A. C. 205, 212.
(3) [1921] 2 A. C. 13.
(4) [1934] 1 K. B. 548, 560.
(5) (1945) A. I. R. (Lah.) 137, 145.
(6) (1945) 14 I. T. Rep. 277.

Income Tax Appellate Tribunal, Bombay v. *Haji Sabumiyan Haji Sirajuddin* (1); and *Benarsi Das Jagannath of Amritsar* v. *Commissioner of Income Tax* (2). The judgment below was not so much applying the principle to the facts of the case as going into a mass of cases which were distinguishable on their facts, and it stressed too much the question whether the contract was one which in law established an interest in land. The real nature of the expenditure is that it was part of the current expenditure of the business and as such should be allowed as a deduction.

Millard Tucker K.C. and *Subba Row* for the respondent. This is a matter of considerable importance to the revenue authorities, because it comes as a complete challenge to what was always accepted—that no deduction ought to be allowed in computing the profits and gains for tax purposes in respect of the wastage of a capital asset. In the view of the judges below the principles deducible from *Alianza Co.* v. *Bell* (3) and *Kauri Timber Co.* v. *Commissioner of Taxes* (4) were applicable in the present case and not the principle enunciated in *Golden Horse Shoe* (*New*), *Ld.* v. *Thurgood* (5), and they therefore held that the price paid by the appellants was a capital expenditure which could not be allowed as a deduction. The question of what is capital and what is revenue expenditure is not a difficult one; a capital expenditure is one which brings into existence an asset—it merely exchanges one asset for another, and that is why there is no deduction. Here the appellants changed their asset for the right to gather the tendu leaves. [Reference was made to *Golden Horse Shoe* (*New*), *Ld.* v. *Thurgood* (5); *Hughes* (*Inspector of Taxes*) v. *British Burmah Petroleum Co., Ld.* (6); *MacTaggart* (*Inspector of Taxes*) v. *Strump* (7); *Salisbury House Estate, Ld.* v. *Fry* (*Inspector of Taxes*) (8); *Commissioners of Inland Revenue* v. *Adam* (9); *John Smith & Son* v. *Moore* (10); *Commissioner of Income Tax, Madras* v. *Chengalvaroya Mudaliar* (11); *Chengalvaroya Chettiar* v. *Commissioner of Income Tax, Madras* (12); *Abdul Kayum Sahib Hussain* v. *Commissioner of Income Tax, Madras* (12);

(1) (1944) 14 I. T. Rep. 447.
(2) (1947) A. I. R. (Lah.) 162.
(3) [1904] 2 K. B. 666.
(4) [1913] A. C. 771.
(5) [1934] 1 K. B. 548, 562.
(6) (1932) 17 T. C. 287.
(7) (1925) 10 T. C. 17, 22, 24.
(8) (1930) 15 T. C. 266, 308.
(9) (1928) 14 T. C. 34, 41.
(10) [1921] 2 A. C. 13.
(11) (1934) 2 I. T. Rep. 395, 398.
(12) (1936) 5 I. T. Rep. 70, 76.
(13) (1939) 7 I. T. Rep. 652, 656.

and *In re Parma Nand Haveli Ram* (1).] The position in *Chengalvaroya Chettiar's* case (2) was the same as in the present case, a lump sum was payable by instalments for the exclusive right not to excavate something under the earth but to take something growing on the earth. It is very difficult to see a distinction there. I am concerned to put the cases clearly before the Board, to see whether the principle covers this case or not. It makes no difference how long the contract is for. What the appellants got for their money was not the leaves, but the right to go and get them, it is a purchase of an interest in the land, and that is a profit à prendre. This case raises a pure question of principle, the effect of which must be felt beyond the bounds of this particular case, and applying all proper and relevant tests the expenditure incurred by the appellants to acquire the right to take tendu leaves was in the nature of capital expenditure, and as such was not a permissible item of deduction under s. 10, sub-s. 2 (xii), of the Act.

A reply was not required.

July 28. The judgment of their Lordships was delivered by LORD GREENE, who stated the facts set out above and continued : It appears to their Lordships that there has been some misapprehension as to the true nature of the agreements and they wish to state at once what in their opinion is, and what is not, the effect of them. They are merely examples of many similar contracts entered into by the appellants wholly and exclusively for the purpose of their business, that purpose being to supply themselves with one of the raw materials of that business. The contracts grant no interest in land and no interest in the trees or plants themselves. They are simply and solely contracts giving to the grantees the right to pick and carry away leaves, which, of course, implies the right to appropriate them as their own property. The small right of cultivation given in the first of the two contracts is merely ancillary and is of no more significance than would be, e.g., a right to spray a fruit tree given to the person who has bought the crop of apples. The contracts are short term contracts. The picking of the leaves under them has to start at once, or practically at once, and to proceed continuously. It is true that the rights under the contracts are exclusive, but in such a case as this that is a matter which appears to their Lordships to be of no significance.

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(1) (1945) A. I. R. (Lah.) 137. (2) (1936) 5 I. T. Rep. 70, 76.

J. C.

1949

MOHANLAL HARGOVIND OF JUBBULPORE, MESSRS. v. COMMISSIONER OF INCOME TAX, CENTRAL PROVINCES AND BERAR, NAGPUR.

The question, therefore, resolves itself into the short one—is expenditure of this character made in acquiring one of the raw materials of the appellants' manufacture capital expenditure within the meaning of this Act ? There is no definition of that expression, which must, in their Lordships' opinion, be construed in a business sense save in so far as there may be rules of construction applicable to it. Their Lordships feel no doubt that in a business sense this expenditure is expenditure on revenue account and not on capital account just as much as if the tendu leaves had been bought in a shop. Under the contracts it is the tendu leaves and nothing but the tendu leaves that are acquired. It is not the right to pick the leaves or to go on to the land for the purpose—those rights are merely ancillary to the real purpose of the contracts and if not expressed would be implied by law in the sale of a growing crop.

In their Lordships' opinion the High Court has adopted an approach to the question which has diverted its view from the real point and has attached too much importance to cases decided on quite different facts. Cases relating to the purchase or leasing of mines, quarries, deposits of brick earth, land with standing timber, etc., referred to in the judgment and relied on in the argument before the Board do not appear to their Lordships to be of assistance : nor do their Lordships consider that the elaborate distinction between movable and immovable property drawn in the judgment affords in such a case as the present a reliable test. The cases principally relied on in the judgment are the *Alianza Co.* v. *Bell* (1) and *Kauri Timber Co., Ld.* v. *Commissioner of Taxes* (2). The former was the case of a company whose object was treated as one to work and develop a bed containing a substance called caliche from which nitrates and iodine could be obtained by a process of manufacture. It was analogous to the purchase or leasing of a mine and was obviously capital expenditure. The claim was one equivalent to a claim to deduct the expenditure made in acquiring the land, for it was a claim to deduct the amount carried year by year to a sinking fund set up to meet the exhaustion of the caliche. This case appears to their Lordships to bear no resemblance to the facts of the present case, which resembles much more closely the case described and distinguished by Channell J. at p. 673

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(1) [1904] 2 K. B. 666 ; [1905] 1 K. B. 184 ; [1906] A. C. 18.

(2) [1913] A. C. 771.

J. C.
1949

Mohanlal Hargovind of Jubbulpore, Messrs. *v.* Commissioner of Income Tax, Central Provinces and Berar Nagpur

of the report in [1904] 2 K. B. of the cost of material worked up in a manufactory. That, said the learned judge, is "a "current expenditure, and does not become a capital "expenditure merely because the material is provided by "something like a forward contract, under which a person "for the payment of a lump sum down secures a supply of "the raw material for a period extending over several years."

In the *Kauri Timber* case (1), the company's business consisted in cutting and disposing of timber. It acquired in some cases timber bearing lands, in other cases it purchased the standing timber. The leases were for 99 years. So far as the cases where the land was acquired were concerned there could have been no doubt that the expenditure made in acquiring it was capital expenditure. In the case of the purchase of the standing timber what was acquired was an interest in land. The purchasers bought the trees which they could allow to remain standing as long as they liked. As Lord Shaw said in delivering the judgment of the Board (2): "So long as the timber, at the option of the company, "remained upon the soil, it derived its sustenance and "nutriment from it. The additional growths became ipso "jure the property of the company." In the present case the trees were not acquired: nor were the leaves acquired until the appellants had reduced them into their own possession and ownership by picking them. The two cases can, in their Lordships' opinion, in no sense be regarded as comparable. If the tendu leaves had been stored in a merchant's go-down and the appellants had bought the right to go and fetch them and so reduce them into their possession and ownership it could scarcely have been suggested that the purchase price was capital expenditure. Their Lordships see no ground in principle or reason for differentiating the present case from that supposed.

Their Lordships will humbly advise His Majesty that this appeal should be allowed and that the respondent should be ordered to pay the costs of the appellants of and relating to the reference to the High Court. The respondent will pay the costs of this appeal.

Solicitors for appellants: *Hy. S. L. Polak & Co.*

Solicitor for respondent: *Solicitor, High Commissioner for India.*

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(1) [1913] A. C. 771.

(2) Ibid. 776.

H. L. (E.)*

1949

June 14, 15;
July 29.

[HOUSE OF LORDS.]

Applied. CORAL *v.* KLEYMAN. [1951] 1 All E.R. 518.

HILL . . . APPELLANT;

AND

WILLIAM HILL (PARK LANE) LD. . RESPONDENT.

Gaming and wagering—Betting—Debts incurred—Report to Tattersalls—Order for payment—Inability to comply—Offer of post-dated cheque—Bookmakers refraining from enforcing order—Independent consideration—Enforceability of agreement—Gaming Act, 1845 (8 & 9 *Vict. c.* 109), *s.* 18.

The appellant having failed to discharge betting debts amounting to 3,635*l.* 12*s.* 6*d.* contracted with the respondents, who were bookmakers, they obtained a decision from the committee of Tattersalls that he should pay 635*l.* 12*s.* 6*d.* within fourteen days and discharge the balance by monthly instalments of 100*l.* He was unable to comply and in August, 1946, the respondents, in consideration of his giving them a cheque post-dated October 10, 1946, for 635*l.* 12*s.* 6*d.* and of the balance being paid by monthly instalments commencing in November, 1946, agreed to refrain from enforcing the order made by the committee, which would have involved his being posted as a defaulter and warned off Newmarket Heath. The cheque having been dishonoured, and the instalments not having been duly paid, the respondents brought an action to recover the sum due under the agreement made in August, 1946.

Held (*per* Viscount Simon, Lord Greene, Lord Normand and Lord MacDermott, Viscount Jowitt L.C., Lord Oaksey and Lord Radcliffe dissenting) that the payments contracted to be made by the agreement were payments of "a sum of money "alleged to be won upon a wager" within the second limb of s. 18 of the Gaming Act, 1845, and accordingly that they were not recoverable.

Bubb v. *Yelverton* (1870) L. R. 9 Eq. 471, and *Hyams* v. *Stuart King* [1908] 2 K. B. 696, overruled.

Dicta to the contrary in *Varney* v. *Hickman* (1847) 5 C. B. 271 and *Diggle* v. *Higgs* (1877) 2 Ex. D. 422 dissented from.

Decision of the Court of Appeal reversed.

APPEAL from the Court of Appeal (Lord Goddard C.J., Tucker and Evershed L.JJ.).

The facts, summarized from their Lordships' opinions, were as follows: The appellant (the defendant in the action),

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**Present:* VISCOUNT JOWITT L.C., VISCOUNT SIMON, LORD GREENE, LORD NORMAND, LORD OAKSEY, LORD MACDERMOTT and LORD RADCLIFFE.

Tom Hill who was a licensed victualler and also an owner of race horses, had betting transactions on horse racing and dog racing with the respondents (the plaintiffs in the action), William Hill (Park Lane) Ld., a company carrying on business as bookmakers, as the result of which he had by March, 1946, lost to them the sum of 3,835*l*. 12*s*. 6*d*. In April he declared himself unable to pay and, following the common practice, the case was reported to the Committee of Tattersalls by the respondents, who referred the matter of their claim against him to them. They heard evidence and adjudicated on the subject-matter of the complaint on July 22, 1946. They decided that 3,635*l*. 12*s*. 6*d*. was due from the appellant and further that this sum ought to be met by a payment of 635*l*. 12*s*. 6*d*. within fourteen days and the remaining 3,000*l*. by monthly instalments of 100*l*. The discrepancy between the sums of 3,835*l*. 12*s*. 6*d*. and 3,635*l*. 12*s*. 6*d*. was due to the fact that 200*l*. of the former sum had been lost in betting on dog races with which the Committee had no concern. As to the functions and procedure of the Committee, it appeared that it was open to anyone alleging that he had won a bet from another on horse racing and that he had not been paid by the date of settlement, to report the matter to them. The committee then held an inquiry, at which evidence might be taken, and decided whether a bet had been lost and, if so, of what amount. They might then make a written order for payment on terms and by instalments. If the loser failed to make payment in compliance with their direction, the next step was that the creditor might report the default to them and request them to send the loser a letter described as " the usual ten day letter " calling on him to comply with their order within ten days and stating that, if he failed to comply, they would report him to the Stewards of the Jockey Club. If that were done the automatic result would be that he would be warned off Newmarket Heath and that his name would be posted as a defaulter. He would thereby be precluded from entering a horse for any race in his own name and from attending race meetings on any course controlled by the Stewards of the Jockey Club. In effect he would be unable to place any further bets on race horses, since it would be unlikely that reputable bookmakers would be willing to accept them. He would also incur a serious social stigma. In fact the appellant did not pay the

635*l.* 12*s.* 6*d.* within fourteen days and the following letters then passed between the parties :

" Ye Olde Chequers Inne,
" Cutnall Green, Nr. Droitwich.
Telephone—Cutnall Green 228.
" August 15th, 1946.

" Wm. Hill Ltd.,
" London.

" Dear Sir,

" I am sorry that I have not yet been able to comply " with the order made against me by Messrs. Tattersalls " but as my financial position at the moment is bad I have " not been in a position to do so. The best I can do at " the moment is to send you a post-dated cheque for " October 10 for 635*l.* 12*s.* 6*d.* and the rest as agreed by " Tattersalls. If you cannot see your way clear to accept " this offer, then I am afraid there is nothing else I can do.

" Yours faithfully,
" Tom Hill."

To this letter the respondents replied by a letter of August 17, 1946, in the following terms :

" Tom Hill, Esq.,
" Ye Olde Chequers Inne,
" Cutnall Green,
" Nr. Droitwich.

" Dear Sir,

" re Account—3,835*l.* 12*s.* 6*d.*

" We have to acknowledge receipt of your letter of the " 15th instant, in which you state that up to the present " you have been unable to comply with the order of Tatter- " salls' Committee of the 22nd ultimo.

" We note your suggestion that you are prepared to " forward to us a cheque for 635*l.* 12*s.* 6*d.* post-dated to " October 10, 1946, the balance of our account of 3,200*l.* " to be paid in monthly instalments of 100*l.* as adjudicated " by the Committee of Tattersalls.

" We agree to your suggestion, and in consideration of " your forwarding your cheque for 635*l.* 12*s.* 6*d.* post-dated " to October 10, 1946, and of the said cheque being honoured " by the bank, and in further consideration of the balance " of our account of 3,200*l.* being paid by instalments of

"100*l*. commencing November, 1946, and each subsequent "month thereafter until our account is clear, we on our "part will refrain from enforcing the order made by "Tattersalls Committee on July 22, 1946.

"Yours faithfully,
"for William Hill (Park Lane) Limited."

The appellant replied in the following letter of August 20, 1946:

"Ye Olde Chequers Inne,
"Cutnall Green, Nr. Droitwich.
"Telephone—Cutnall Green 228.
"20th Aug. 1946.

"Wm. Hill Ltd.,
"London.

"Dear Sirs,

"With reference to your letter of the 17th inst. re account "3,835*l*. 12*s*. 6*d*. I am enclosing cheque for 635*l*. 12*s*. 6*d*. "post-dated to October 10 as agreed with instalments of "100*l*. per month commencing in Nov. to follow. Thanking "you for your helpful consideration in this matter and "assuring you that as soon as my financial position improves "I shall do all I possibly can to settle this account as soon "as possible.

"Yours faithfully,
"Tom Hill."

The cheque, on due presentation, was not honoured and the appellant failed to pay any instalments. The first payment which was made was an amount of 335*l*. 12*s*. 6*d* sent by cheque to the respondents on November 19, 1946. This was accepted by them "without prejudice to the legal position" and on the understanding that the terms of the agreement of August 20, 1946 remained unaltered. This cheque was honoured. The appellant made no further payment and on February 21, 1947, the respondents issued a specially endorsed writ. The endorsement was as follows:

"STATEMENT OF CLAIM

"The plaintiffs' claim is for the sum of 700*l*. 0*s*. 0*d*. "instalments in arrear and payable by the defendant "to the plaintiffs under an agreement between the plaintiffs "and the defendant on August 20, 1946.

"PARTICULARS

		£	s.	d.
"1946				
"10 Oct.	To balance of instalment due on this date	300	0	0
"10 Nov.	To instalment due on this date ..	100	0	0
" Dec.	To instalment due on this date ..	100	0	0
"1947				
" Jan.	To instalment due on this date ..	100	0	0
" Feb.	To instalment due on this date ..	100	0	0
		"£700	0	0"

The appellant was given leave to defend on filing an affidavit stating that the money claimed had been won upon wagers on horse races and setting up s. 18 of the Gaming Act, 1845, as an answer. Hallett J. gave judgment in favour of the respondents. He said (inter alia): "It is quite clear . . . . "that the decision of the majority of the Court of Appeal "in *Hyams* v. *Stuart King* (1) is binding upon me . . . . All "I have got to decide is: Does this case fall within the spirit "of that decision? I think it quite clearly does. I think "this is a plain case where the defendant made a fresh bargain "in August in consideration of the plaintiffs refraining from "following up the procedure with Tattersalls' Committee "which would inevitably have led to the defendant being "then and there posted as a defaulter and warned off "Newmarket Heath." In the Court of Appeal it was conceded that the case was covered by the former decision and the judgment of Hallett J. was affirmed. The appellant appealed to the House of Lords.

Salmon K.C. and *Faulks* for the appellant. The Gaming Act, 1845, s. 18, prohibits such an action as this. If the legislature intended to prevent people having recourse to the courts to collect money won on a wager, it is unlikely that it would have introduced words into the section which would enable them to do by an artifice what they could not otherwise achieve. In this case the parties were merely agreeing on the method of paying the wagers. If the decision in *Hyams* v. *Stuart King* (1) is correct this appeal must fail. On the reasoning on which it is based, the money agreed to be paid was merely the price of not being reported to Tattersalls,

(1) [1908] 2 K. B. 696.

but if that was so then, even after the money was paid, the gaming debt would be outstanding. It is not suggested that the respondents would have been acting harshly or improperly if they had reported the matter to Tattersalls or that such a case as this is one of demanding money with menaces. On the basis that this was a genuine contract made for good consideration it is unenforceable under s. 18. It was not merely colourable, because it was really a contract for the repayment of a gaming debt. The test is whether that which is to be handed over is paid in settlement of a gaming debt and whether thereafter the gaming debt is still due and owing. This is not a contract "by way of gaming or wagering" within the first limb of s. 18 but it falls expressly within the second limb as money "alleged to be won upon any "wager," being connected with the payment of a bet, and being alleged in the claim to be won on a wager. The second limb of s. 18 must be construed as extending the first because if it were confined to contracts "by way of gaming or "wagering" it would be tautologous. The decision in *Hyams* v. *Stuart King* (1) was wrong and should be overruled and the dissenting judgment of Fletcher Moulton L.J. therein was right. The decision has never been referred to in flattering terms in text books and it has frequently been criticized in authorities: see Lord Wright in *Evans* v. *Bartlam* (2); *Poteliakhoff* v. *Teakle* (3); *Robertson* v. *Balfour* (4); Cheshire and Fifoot on the Law of Contract (2nd ed.), p. 234; and Professor Dicey on *Hyams* v. *Stuart King* (1) in an article in 1909 (25 Law Quarterly Review, p. 76). Denning L.J. in *William Hill (Park Lane) Ld.* v. *Rose* (5) discussed the question of consideration and the appellant here says that the agreement sued on was a new promise to pay an antecedent betting debt the consideration for which was past consideration. [They also referred to *Bridger* v. *Savage* (6).]

Sir Walter Monckton K.C., *Fearnley-Whittingstall K.C.* and *Wingate-Saul* for the respondents. A restricted interpretation should be put on s. 18 of the Gaming Act, 1845, and accordingly the contract sought to be enforced is not within that enactment, nor is it within any other enactment in the like behalf. If the Act were given an extended interpretation the stakeholder cases could not have been decided as they were: see *Varney*

(1) [1908] 2 K. B. 696.
(2) [1937] A. C. 473, 489.
(3) [1938] 2 K. B. 816, 825.
(4) 1938 S. C. 207, 212–3.
(5) (1948) 65 T. L. R. 34, 35.
(6) (1885) 15 Q. B. D. 363.

v. *Hickman* (1) per Maule J.; *Diggle* v. *Higgs* (2); *Martin* v. *Hewson* (3); *Hampden* v. *Walsh* (4); *Trimble* v. *Hill* (5); *O'Sullivan* v. *Thomas* (6); *Burge* v. *Ashley & Smith Ld.* (7). Though one might have given an extended meaning to s. 18 if the matter were res integra, by the time *Hyams* v. *Stuart King* (8) arose for decision, it could no longer be given such a meaning. Now for more than forty years—or eighty years, if one reckons from *Bubb* v. *Yelverton* (9)—the principle in that case has been applied; the judges have never cast the net wider. The House should hesitate before allowing *Hyams* v. *Stuart King* (8) to be reversed after it has stood so long and been loyally and frequently applied. It should not be reversed unless it is clearly wrong. If it had been wrong the legislature could have remedied the matter as it did in previous cases. *Read* v. *Anderson* (10) was dealt with by the Gaming Act, 1892, and *Sutters* v. *Briggs* (11) by the Gaming Act, 1922. In these circumstances it would be a strong measure to reverse this decision. This is not such a case as *Bourne* v. *Keane* (12) or *Fibrosa Spolka Akeyjna* v. *Fairbairn, Lawson, Combe, Barbour Ld.* (13), which overruled old decisions. In other cases the House has refused to do so and here the maxim stare decisis should apply. In s. 18 of the Act the second limb of that section is expository only and adds nothing to the first, nor does the third. The first limb relates to contracts "by way of gaming or wagering," and this is admittedly not such a contract and cannot be defeated under it. The second limb relates to "any sum of money or valuable thing "alleged to be won upon any wager" and is a mere repetition of the first, so that the action cannot fail under this limb either. This limb is really tautologous, repeating what has already been enacted and only relating to contracts already declared void by the first branch. As to tautologies in statutes, see *Hough* v. *Windus* (14) and *Garbutt* v. *Durham Joint Committee* (15); see also *Varney* v. *Hickman* (16) and *Diggle* v. *Higgs* (17).

(1) (1847) 5 C. B. 271, 274–5, 281.
(2) (1877) 2 Ex. D. 422, 429.
(3) (1855) 10 Ex. 737.
(4) (1876) 1 Q. B. D. 189, 194.
(5) (1879) 5 App. Cas. 342, 344–5.
(6) [1895] 1 Q. B. 698.
(7) [1900] 1 Q. B. 744.
(8) [1908] 2 K. B. 696.
(9) (1870) L. R. 9 Eq. 471.
(10) (1884) 13 Q. B. D. 779.
(11) [1922] 1 A. C. 1.
(12) [1919] A. C. 815.
(13) [1943] A. C. 32.
(14) (1884) 12 Q. B. D. 224.
(15) [1906] A. C. 291, 296.
(16) 5 C. B. 271.
(17) 2 Ex. D. 422.

In so far as it is not tautologous, the second limb, governed by the opening provision of the first limb, which enacts a substantive change in the law, follows it up with a corresponding provision relating to procedure. On the respondents' construction, even if the appellant's promise is to be regarded as a promise to pay unpaid bets, the second limb of s. 18 does not invalidate it, because that limb is concerned only with actions to enforce gaming and wagering contracts dealt with in the first branch. Alternatively, the promise was not to pay unpaid bets but an amount equal to the unpaid bets. This was the effect of *Bubb* v. *Yelverton* (1) and *Hyams* v. *Stuart King* (2). Thus the sum promised to be paid is no longer money won on a wager, but is a sum of money at large due under a lawful and enforceable contract. The respondents' construction follows from the wording of s. 18. The phrase " recovering any sum of money or valuable thing " alleged to have been won upon a wager " really means " enforcing any such contract or agreement," referring back to the first limb of s. 18. In particular, the word " alleged " supports the respondents' construction. It has reference to a material allegation, a necessary part of his case. If the allegation in the pleading was an allegation of a contract to pay the unpaid bets as such, it was, in that respect, immaterial and can be ignored, leaving the pleading to be read as alleging a promise to pay a sum of money at large. The bets are only a historical incident forming no necessary part of the allegation on which the claim is founded. As to the expression " valuable thing," the loser of a bet might agree to give up some chattel to the winner in consideration of the bet being treated as wiped out and no complaint being made of the failure to pay it promptly in cash ; in an action to recover such a chattel it might not be shown to be sued for as won upon a wager. Such an agreement might be to hand over a racehorse or a motor-car and it would be enforceable. Here the promise on which the respondents' action was brought was supported by good and lawful consideration independent of and apart from any pre-existing wagering agreements. They agreed to refrain from the Tattersalls course of action which they were perfectly well entitled to take, in consideration of the appellant's new agreement ; that was a new contract. It is immaterial that it had its origin in a gaming and wagering transaction, for in the long line of nisi prius cases in which

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(1) L. R. 9 Eq. 471.

(2) [1908] 2 K. B. 696.

Hyams v. *Stuart King* (1) was applied, the court always inquired whether the parties made a new bargain for a real consideration. The court examines the reality of the bargain. Such a bargain as this is real to persons in the racing world. It is that what was formerly a debt of honour only and irrecoverable is made recoverable in consideration of the bookmaker refraining from taking action at Tattersalls. The second contract is separate and there is no question of suing on the wager. This is not a mere colourable transaction, for that would mean a sham transaction with an ulterior purpose. No one would enter into a sham bargain to pay a debt to make himself liable when he was not liable before. The transaction is that in return for the respondents' forbearance from doing something the appellant is willing to pay something. The contract is not tainted by illegality. It is not a case of demanding money by menaces: see *Thorne* v. *Motor Trade Association* (2) and s. 29 of the Larceny Act, 1916, where "reasonable or probable cause" is the test. Here there was a moral debt and no court could hold that there was extortion. [They also referred to *Moulis* v. *Owen* (3); *In re Browne. Ex parte Martingell* (4) and *Chapman* v. *Franklin* (5).]

Salmon K.C. in reply. It is not disputed that there was here a genuine new bargain, but it was a bargain to pay money alleged to be won upon a wager, and an action on such a bargain is expressly prohibited by the second branch of s. 18. Its words are not purely tautologous. The object of the Act was to discourage betting and it forbade recourse to the courts to recover money "alleged to be won upon any wager." Words which effectively carry out the purpose of the legislature should not be ignored. In *Diggle* v. *Higgs* (6) and *Varney* v. *Hickman* (7) the observations relied on by the respondents were made in cases which dealt directly with wagering contracts which fell squarely within the first limb of s. 18, so that it was not necessary to look at the second limb. The appellant's argument may be summarized as follows: (*a*) It is plain on the documents that the contract relied on was one to pay money alleged to be won upon a wager. (*b*) It is not suggested that this is a wagering contract within the first limb of s. 18. (*c*) It follows from the first proposition that the proceedings brought by the respondents are proceedings to recover money alleged to be won on a wager. (*d*) These proceedings are expressly prohibited by the second limb of s. 18, which in terms prohibits such an action. (*e*) If no effect is given to the second limb of s. 18, sums " alleged to be won upon any wager " can be recovered ; for this action to succeed one must ignore its express language, defeating the intention of the legislature. The stakeholder or deposit cases relied on by the respondents were correctly decided whichever view one takes of the construction of s. 18. *Hough* v. *Windus* (1) relied on by the respondents helps the appellant when it is properly regarded. By treating the relevant words of s. 18 as tautologous, one would be defeating the plain intention of the legislature. It is suggested that even if *Hyams* v. *Stuart King* (2) was wrongly decided, it was now too late to disturb it. But if it was wrongly decided the effect has been that bookmakers have enjoyed a privilege which Parliament intended to deny them and there is no reason why they should continue to do so. In *Fibrosa Spolka Akeyjna* v. *Fairbairn, Lawson, Combe, Barbour Ld.* (3), the House goes into the circumstances in which old authorities should be overruled and this case satisfies them. By the second part of s. 18, the legislature made a careful and thorough attempt to discourage gaming : see also Gaming Act 1835.

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(1) [1908] 2 K. B. 696.
(2) [1937] A. C. 797.
(3) [1907] 1 K. B. 746, 764.
(4) [1904] 2 K. B. 233.
(5) (1905) 21 T. L. R. 515.
(6) 2 Ex. D. 422.
(7) 5 C. B. 271.

The House took time for consideration.

July 29. Viscount Jowitt L.C. My Lords, it is clear that the decision of Tattersalls did not create any obligation enforceable at law ; all that committee had done was to fix the amount of the wagers due in respect of horse racing and to give a decision as to the manner in which it would be proper for the appellant to discharge the amount so fixed. Counsel on both sides disclaimed the idea that the respondents would have been acting harshly or improperly had they decided to report the appellant if he failed to carry out the decision of Tattersalls' committee. The threat so to act would no doubt have been intended to bring pressure upon the appellant to pay ; but the cause for so acting would have been so eminently

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(1) 12 Q. B. D. 224, 228.
(2) [1908] 2 K. B. 696.
(3) [1943] A. C. 32.

H. L. (E.)

1949

HILL
v.
WILLIAM HILL (PARK LANE) LD.

Viscount Jowitt L.C.

reasonable and proper that I cannot think any question of blackmail arises and I agree with the submission that counsel on both sides made to us on this point.

The only question that falls for decision in this case is whether the contract concluded by the letters of August 17 and 20 is enforceable at law.

It was agreed by counsel on both sides during the argument that the contract so made was a genuine contract; that it was made for good consideration and that it was not merely a colourable device to obtain payment of a bet: and that it was not a contract "by way of gaming or wagering." The trial judge was apparently of the same opinion for he states his view as follows: "I think this is a plain case where the "defendant (appellant) made a fresh bargain in August in "consideration of the plaintiffs (respondents) refraining from "following up the procedure with Tattersalls' committee "which would inevitably have led to the defendant (appellant) "being then and there posted as a defaulter and warned off "Newmarket Heath."

We have not been furnished (no doubt as a result of a laudable desire to cut down the amount of printing) with much of the material which was available to the trial judge: for example we have not had an opportunity of reading the evidence which was given before the trial judge and we have not been supplied with copies of all the letters to which he referred in his judgment. In the result, we have not had sufficient materials upon which to question the view of the trial judge, but, as I have said, counsel did not ask us to do so and I see no reason to doubt the correctness of his decision.

It is no doubt true that the contract arose out of a wager. If there had been no wager and no money lost as a result of that wager such a contract would never have been concluded. But long before this contract was concluded the last transaction by way of gaming and wagering had taken place, and the event on which the wager depended had been ascertained. Such a contract is therefore unquestionably valid and enforceable unless there is some statutory provision which renders it unenforceable, and such a statutory prohibition is to be found, if at all, in s. 18 of the Gaming Act, 1845, which is in the following terms: "All contracts or agreements, whether by "parole or in writing, by way of gaming or wagering, shall "be null and void; and no suit shall be brought or main-"tained in any court of law or equity for recovering any "sum of money or valuable thing alleged to be won upon any "wager, or which shall have been deposited in the hands of "any person to abide the event on which any wager shall "have been made . . . ." There follows a proviso that "this enactment" shall not be deemed to apply in certain conditions which are not here material.

Since this contract was admittedly not a contract "by way "of gaming or wagering" it is not affected by the first limb of this section. It is said, however, that the contract comes within the second limb: "no suit shall be brought . . . . for "recovering any sum of money . . . . alleged to be won "upon any wager." I cannot regard this limb of the clause as having any such far reaching effect as to invalidate such a contract as is here in question: it is, to my mind, as a matter of construction, to be treated rather as a provision dealing with procedural matters which are to be the consequences of the simple proposition (stated in the first limb) that all contracts by way of gaming or wagering shall be null and void. I find support for this view from the use of the word "alleged": from which it is clear that the prohibition contained in the second limb is only to operate if there is the appropriate allegation. The words we have to construe are not "no suit "shall be brought for recovering any sum of money won "upon any wager" and it would, I think, be doing violence to the words if we were so to construe them. The mere bringing of an action (even although the action, when the facts came to be investigated, might prove to be based on a contract which was by way of gaming or wagering and therefore null and void) might bring a defendant who was resisting such an action into public disrepute. The section therefore provides that if it is apparent that the declaration was based upon a contract by way of gaming or wagering, the action should be struck out in limine.

It is argued that the second limb of this section relates to contracts, which though not by way of gaming or wagering, have some historical connexion with the payment of a bet. The consequences of this view would, I think, be very far reaching: and I have difficulty in seeing where to draw the line. It is not fanciful to suppose that a man who has lost a bet and has not at his immediate disposal funds to pay that which he owes in respect of the bet, might sell a chattel or indeed an estate to the person to whom he had so lost money on terms more favourable than he would have demanded, if there had been no bet and no resulting debt of honour. For example, if the appellant had owned a horse worth X*l.* and had sold it to the respondents for X*l.*-Y in full settlement of all obligations, would such a contract be avoided? I agree that if such a contract were a mere device to make a bet enforceable at law—in other words if the contract were "colourable"—it could not be enforced. But unless this is the test which separates enforceable contracts from those that cannot be enforced, I find it difficult to find any test. I cannot think that the legislature, if it had intended by the second limb of the section to add such an important provision to the substantive law enacted by the first limb, would have left the whole matter in this state of uncertainty. In his powerful dissenting judgment in *Hyams* v. *Stuart King* (1), Fletcher Moulton L.J. thus deals with the problem: "Finally it was suggested before us that there was a "contract, not to pay the bet, but to pay a sum equal "to it in amount, and that the consideration of that contract "was a promise not to tell of the defendant's default . . . . But "if such a contract had been formally made, it would "not, in my opinion, better the position of the plaintiff. "I should unhesitatingly hold that such a contract was only "colourable, and that the real intention of both parties was "that the bet should be paid. Even apart from this, the "alleged contract would, in my opinion, be unenforceable. "If a son loses a bet of 20*l.* which he cannot pay, it makes no "difference, in my mind, whether the bookmaker says: "'I will tell your father if you don't pay the bet' or 'I will tell "'your father if you don't give me 20*l.*' In the one case he "is trying to get a contract to pay the bet and in the other "case a contract to pay blackmail. Neither of these contracts "will be enforced by the courts." For reasons I have already given I do not regard this contract as colourable; and I certainly do not regard it as a contract to pay blackmail, and counsel on both sides in the present case agree with me on both these points. If I thought the contract merely colourable I should regard it as null and void by reason of the first limb of the section: if I thought the contract was a contract to pay blackmail it would plainly not be enforced by the courts. Yet these are the only answers suggested by Fletcher Moulton L.J. to such a contract as he predicated in that case and to such a contract as we find in the present case.

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(1) [1908] 2 K. B. 696, 723.

In my view, this was a genuine and bona fide contract made for good consideration to pay a sum of money which—if its "present value" be regarded—was substantially less than the amount which the appellant had lost to the respondents by betting on horses: and (by reason of the delay in paying the first instalment) was substantially less than the amount which the committee of Tattersalls had decided should be paid. I cannot think that such a contract is invalidated merely because as a matter of history some of its provisions can be traced back to a bet.

It was argued that we were bound to construe the second limb of s. 18 of the Gaming Act, 1845, as extending the provision expressed in the first limb, because if the second limb were confined to contracts by way of gaming and wagering it would in fact be tautologous. It is of course true that the second limb of the section is unnecessary and tautologous if it adds nothing to the first limb. But if it is regarded as procedural it is, I think, possible to give it a sufficient meaning. Moreover, it might have some effect in the case of wagers concluded abroad which were the subject of litigation in this country. But, my Lords, even if the second limb is to be regarded as tautologous, it would certainly not be the first time in which the legislature had indulged in tautology, and it is interesting to observe that in the Gaming Act, 1892, almost the same words are used in a context in which they are plainly tautologous.

The words contained in the second limb of s. 18 of the Gaming Act, 1845, were considered by Alderson B. in *Moon* v. *Durden* (1) to be "redundant" and by Parke B. to be "surplusage." In *Varney* v. *Hickman* (2), Maule J. expresses his view as follows: "Now, the first branch of this section "declares the contract to be null and void: the second prevents "the winner from bringing an action to recover the amount "of the bet from the loser: and the third prevents the winner "from suing the stakeholder. It certainly is true that the "second branch is involved in the first; that is to say, that, "if the section had stopped at the end of the first branch, it "would have followed that no action could be brought to "enforce a contract so declared to be void. But I apprehend "there is nothing unusual in an Act of Parliament stating "a legal consequence in this way." Cresswell J. says (3):

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(1) (1848) 2 Ex. 22, 41, 44.

(2) 5 C. B. 271, 280.

(3) Ibid. 282.

"The second branch of that section may be superfluous, or it "may have been inserted ex abundanti cautela. It is "extremely difficult to say what may be the purpose for which "it was introduced." In *Diggle* v. *Higgs* (1), Lord Cairns L.C. expresses his view of the section: "The section amounts to "this: all contracts by way of gaming and wagering are null "and void; and then, dealing with those contracts, it says "that no action shall be brought with respect to them: that "is to say, all gaming contracts are void, and the winner of "the game or wager shall not maintain a suit against "his antagonist or the stakeholder. This construction "makes one member of the section in unison with the "other." Cockburn C.J. (2) expresses his doubt upon the point but was not prepared to differ from the view expressed in *Varney* v. *Hickman* (3). Bramwell L.J. (4), expresses his agreement with the view of Lord Cairns and adds: "I only "wish to add that the clause of s. 18 that 'no suit shall be "'brought for recovering money won upon a wager' is unnecessary, and might have been left out of the statute; it "seems to me to be wholly superfluous." It is no doubt the fact that these expressions of opinion were not strictly necessary for the decision of the point then before the courts but they do indicate the view which great masters of the law have taken with regard to the true construction of the section, and I find support in them for the construction which I have myself arrived at independently of these cases. For these reasons I am of the opinion that the decision of the Court of Appeal was right and I should be in favour of dismissing this appeal.

VISCOUNT SIMON. My Lords, the conclusion to be reached by the House in this appeal will determine the answer to a question which has been the subject of considerable debate among legal text-writers and commentators for forty years past, viz. whether the decision arrived at by the Court of Appeal in *Hyams* v. *Stuart King* (5) is good law. In that case, the promise, at the request of the loser of a bet, by the winner not to present or seek to enforce payment of the loser's cheque for the amount he had lost, together with the winner's promise not to expose his default, was held by the majority of the court (Gorell Barnes P. and Farwell L.J.) to be good consideration

(1) 2 Ex. D. 422, 427.
(2) Ibid. 428.
(3) 5 C. B. 271.
(4) 2 Ex. D. 422, 429.
(5) [1908] 2 K. B. 696.

for a new and enforceable agreement by the loser to pay what was owing. Inasmuch as forbearance to claim prompt payment of an unenforceable debt like a bet cannot constitute good consideration for a legally binding promise to pay the amount later on, the real point of the decision of the majority was that the promise not to expose the loser's default to his detriment constituted effective consideration, in consequence of which the sum owing could be recovered in an action. Fletcher Moulton L.J. delivered a dissenting judgment, holding that the language of s. 18 of the Gaming Act, 1845 (8 & 9 Vict. cap. 109) prevented the winner from recovering in the action the sum sued for, as in his opinion it was "a sum of money alleged to be won upon a wager," notwithstanding that the fresh promise had been made. The present appellant admits that if the view of the majority in *Hyams* v. *Stuart King* (1) is correct, his appeal must fail, but he contends that the minority view of Fletcher Moulton L.J. correctly construes the section and that by applying this view to the facts of the case now before us the appeal should succeed.

As a result of betting with the respondents the appellant lost, on balance of account, the sum of 3,835*l.* 12*s.* 6*d.*, all but 200*l.* of which was lost in betting on horse racing. In April, 1946, the appellant declared himself unable to pay and the respondents thereupon referred the matter of their claim against the appellant to the Committee of Tattersalls. This committee concerns itself solely with bets on horse racing and, after hearing evidence, made an order in respect of the 3,635*l.* 12*s.* 6*d.* so lost, directing the appellant to pay to the respondents the sum of 635*l.* 12*s.* 6*d.* forthwith and thereafter to pay the remainder of the gambling debt at the rate of 100*l.* per month. So far, there can be no question that the debt, though a debt of honour, was not a debt payment of which could be enforced by law, for the promise to pay it, by the first words of s. 18, was "null and void." What followed, however, is said by the respondents to constitute a new agreement which is untouched by the section.

The real issue in this case is not whether there was "a fresh "bargain," or whether the respondents gave good consideration for the appellant's agreement to pay in the manner defined in the letters of August 17 and August 20, but whether the payments he thus contracted to make were payments of "a sum of money alleged to be won upon a wager" within the

(1) [1908] 2 K. B. 696.

meaning of the second limb of s. 18. The contract sued on is identified in the writ as being the agreement made on August 20, and if it was not so identified details of it could have been obtained by demanding particulars. What then is this contract alleged by the respondents upon which the suit is brought? It is a contract to pay what Tattersalls' committee ordered the appellant to pay, though the respondents are giving more time for such payment. But there can be no question that what the committee ordered the appellant to pay was a sum of money won by the respondents from him upon wagers as to the result of horse races. Tattersalls' committee did not profess to have any jurisdiction to deal with any other subject matter, and indeed the respondents' letter of August 17 correctly interprets the letter of August 15, to which it is a reply, as containing the statement, "that up "to the present you have been unable to comply with the order of Tattersalls' committee." The arrangement, by the very terms of the letter of August 17, is to pay by instalments "the balance of our account" and the account is an account of betting transactions and of nothing else. The first limb of s. 18 does not apply to the case because the contract sued on is not "by way of gaming or wagering" but is a new bargain; but inasmuch as the new bargain was to pay the betting account, an action brought upon it, as it seems to me, is nevertheless brought for recovering sums won by betting.

In opposition to this view of the matter three considerations are urged and I must deal with them in turn. First, it is said that the second limb of the section is mere repetition of the first and thus if the action is not defeated under the first limb it cannot fail under the second. Secondly, this last contention is varied by arguing that the second limb is not entirely tautologous, but is governed by the opening provision which enacts a substantive change in the law, by following this up with the corresponding provision relating to procedure. Thirdly, it is suggested that the word "alleged" in the second limb creates a difficulty which shows that the appellants' construction of the section is wrong.

As regards the first of these objections, it is to be observed that though a Parliamentary enactment (like parliamentary eloquence) is capable of saying the same thing twice over without adding anything to what has already been said once, this repetition in the case of an Act of Parliament is not to be assumed. When the legislature enacts a particular phrase in a statute the presumption is that it is saying something which has not been said immediately before. The rule that a meaning should, if possible, be given to every word in the statute implies that, unless there is good reason to the contrary, the words add something which would not be there if the words were left out. If the choice is between tautology and retrospective effect (as in *Hough* v. *Windus* (1)) it is natural to prefer a construction which implies the reproach that Parliament has said the same thing twice over in preference to a construction which would have the result of undeclared retrospective interference, but no difficulty of choice of that sort arises here. Indeed, the proper construction of one section can seldom be assisted by reference to a decision on the construction of quite a different section in another statute. The presumption, therefore, is that the second limb of s. 18 is not coincident in effect with the first limb. It is noteworthy that in *Hyams* v. *Stuart King* (2) the report of the argument contains no trace of a submission to this effect and Fletcher Moulton L.J. observes (3) that " too little attention has been paid to " the distinction between the two parts of this enactment, and " the second part has been treated as being in effect merely " a repetition of the first part." This is the more striking because the actual facts in that case as set out (4) show that the winner of the bet wrote to the loser " You promised " faithfully that, if I kept quiet and did not injure your business " by telling any of the s.p. men, or take proceedings, you would " pay every farthing that was owing " and reproached him for breaking his word, so that the argument would have been a powerful one that it was this debt which the plaintiff was seeking to recover. It appears to me that Fletcher Moulton L.J. was entirely justified in saying that the statute was so framed as to defeat an action, though not brought upon the original wagering contract, if it was brought upon an alleged new contract to pay a sum won on the wager. Gorell Barnes P. (5) refers briefly to this contention that the second limb of s. 18 goes further than the first limb, but dismisses it by saying " . . . . when the nature of the contract, as I have " stated it, is considered, the contract does not, in my opinion, " fall within the language nor the meaning of the statute." What the President meant by " the contract as I have stated

(1) 12 Q. B. D. 224.
(2) [1908] 2 K. B. 696.
(3) Ibid. 712–3.
(4) Ibid. 697.
(5) Ibid. 705.

"it" appears from the previous page where he describes it as one "that in consideration that the plaintiff would give the "defendants a reasonable time within which to pay the amount "which the defendants ought to have paid him on November 4, "and would forbear to declare them defaulters if they paid "within that further time, they would pay him on or before "the expiration of that time the amount which both parties "considered was due to the plaintiff in honour, though not "by law." But it seems to me that the amount which was due to the plaintiff in honour was a sum won upon a wager, as Fletcher Moulton L.J. proceeded to point out. Farwell L.J.'s judgment does not appear to contain any implied reference to Fletcher Moulton L.J.'s view, and indeed he regards "the gist of the case" (1) as concerned with the question whether threatening to post a defaulter for failure to pay a lost bet would properly be described as blackmail. I should agree that in ordinary circumstances it would not amount to a criminal offence, but that does not touch the point raised in Fletcher Moulton L.J.'s dissenting judgment upon which the present appellant relies. What happens in such a case as this is that by a new contract it is sought to transform an obligation of honour into a legal liability and the argument against the appellant on this part of the case must be that this transformation turns money which was in the first place won on a wager into something else. But it appears to me that, at any rate on the facts of the present case, it is clear that the sum of money sought to be recovered not only owes its origin to the fact that bets were made but is itself a sum of money so won. When the long history of our legislation to discourage gaming in this country is considered, it is difficult to suppose that the legislature in 1845 did not realize that the object in view would not be attained merely by enacting that bets could not be recovered as such. The Act of 1845 begins with a preamble reciting that previous legislation had not proved completely effective to prevent the mischiefs arising from this cause. I would accept without further comment the passage in Fletcher Moulton L.J.'s judgment where he says (2): "One cannot read the Gaming Act, 1845, without "perceiving that it was a very serious attempt on the part of "the legislature to put down wagering, and I decline to think "that such an obvious and fatal blot was permitted to exist "in it, which would well-nigh neutralize its practical effect,

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(1) [1908] 2 K. B. 696, 726.

(2) Ibid. 713–4.

" when I find language used which is perfectly apt to meet " the case and which to my mind can fairly bear no other " interpretation than that which would thus render it " effective."

As for the second suggested objection, it is enough to say that if all the legislature had wanted to do after providing that contracts by way of wagering should be null and void was to add that, as a matter of procedure, no suit should be brought to enforce them, it would have been quite simple to say so. Instead of this, the second limb of the section is framed in quite different and much wider terms and in my opinion aims at defeating the attempt to recover betting losses by such a device as the present.

Lastly, as to the word " alleged." No difficulty arises in the present case from the use of this word, for the respondents do in terms allege that the sum they seek to recover is claimed under a contract to pay the balance of the betting account and to satisfy an order of Tattersalls' committee which is concerned with nothing but establishing betting liability. Even if the case was one in which this did not clearly appear from the claim itself, particulars as to the nature of the contract relied on would disclose it. The language of the second limb of the section appears to be apt to cover the case where a plaintiff's declaration was of this nature and would justify the defendant in meeting the declaration by a demurrer. In modern practice, as soon as the nature of the plaintiff's case is found to fall within the second limb, the procedure would be to seek to strike out the statement of claim and to dismiss the action on the ground that such a claim could not possibly succeed. It may be that if a plaintiff managed to launch an action to recover his winnings on betting without either alleging that this was the nature of his claim or being compelled to give particulars to disclose it, the truth of the matter could be established by the defendant, though in that event the language of the section is awkward because the defendant's success would depend not on what he alleged but on what was proved. In any event, I do not see how the suggested difficulty in construing the word " alleged " assists the contention of the present respondents.

The view which I adopt involves the overruling of the decision in *Bubb* v. *Yelverton* (1). There Lord Romilly M.R. in the year 1870 held (2) that a bond given by the loser of a bet as security for paying the sum involved could be enforced on the ground that "it was given, not to pay racing debts, but to "avoid the consequences of not having paid them." There were special circumstances in that case which may have induced the Master of the Rolls to reach his conclusion, but I agree with Fletcher Moulton L.J. that the bond constituted an agreement to pay money won on wagers, notwithstanding the new considerations, and is thus unenforceable under the second limb of s. 18. There is an indication in the report of the argument for the loser that this contention was put forward and it ought to have prevailed. Subsequent cases which essentially depend on following *Bubb* v. *Yelverton* (1) must also be regarded as wrongly decided.

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(1) L. R. 9 Eq. 471. (2) Ibid. 474.

We were referred to dicta to be found in some of the judgments in *Varney* v. *Hickman* (2) and in *Diggle* v. *Higgs* (3). These two cases arose out of a demand by the plaintiff to recover money which he had deposited with a stakeholder to abide the event in respect of which he had made a bet. In the earlier case the plaintiff had repudiated the wager before the event was ascertained and it was held that he was entitled to recover the amount as money had and received. In the later case the plaintiff succeeded even after the event had been decided and the plaintiff had lost his bet, inasmuch as the money was still in the hands of the stakeholder and had not been paid over to the winner. Neither of these cases, therefore, directly involved the portion of s. 18 of the Act of 1845 which prohibits the maintenance of actions for the recovery of money won upon any wager, and the decisions turned on the proper application of a later limb of the section dealing with the recovery of what has been deposited in the hands of a stakeholder, and lay down that the language of that limb does not deprive a party who deposits money with a stakeholder to abide the event of a wager of what Parke B. in *Martin* v. *Hewson* (4) (a cock-fighting case) calls a locus pœnitentiæ. But Maule J. in *Varney* v. *Hickman* (2) and Lord Cairns and Bramwell L.J. in *Diggle* v. *Higgs* (3) expressed a view as to the interpretation of the second limb of the section upon which the present respondents rely. Maule J. said (5): "Now, the "first branch of this section declares the contract to be null

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(1) L. R. 9 Eq. 471.
(2) 5 C. B. 271.
(3) 2 Ex. D. 422.
(4) 10 Ex. 737, 738.
(5) 5 C. B. 271, 280.

H. L. (E.)

1949

HILL
v.
WILLIAM
HILL
(PARK
LANE)
LD.

Viscount Simon.

" and void ; the second prevents the winner from bringing an " action to recover the amount of the bet from the loser : and " the third prevents the winner from suing the stakeholder. " It certainly is true that the second branch is involved in " the first : that is to say, that, if the section had stopped " at the end of the first branch, it would have followed that " no action could be brought to enforce a contract so declared " to be void. But I apprehend there is nothing unusual in " an Act of Parliament stating a legal consequence in this " way." Logically, it does not follow that because the second branch was not needed to prevent the success of an action to recover a bet, therefore the ambit of the second branch is limited to the case where the action would fail even apart from what the second branch says, for it would still be a possible view that the second branch also covers some actions which were not rendered void by the first limb. But I think Maule J. did mean to express the view that the second limb was merely tautologous, and this is certainly the effect of Bramwell L.J.'s observation in *Diggle* v. *Higgs* (1) where he roundly declares that the words of the second limb are " unnecessary, and might have been left out of the statute." These dicta, however, were not essential to the correctness of the decisions in which they occur and it is to be observed that Cockburn C.J. (2) while concurring in the actual decision in *Diggle* v. *Higgs* (1) entertained a different opinion of the true construction of the section as a whole. Now that the question of the proper range of the second limb of s. 18 comes up as the direct issue for final decision the dicta to which I have referred must give way before the analysis and reasoning which Fletcher Moulton L.J. first set on foot.

In the course of the argument before us hypothetical illustrations were put in which it was suggested that a " valuable " thing " agreed by the loser of a bet to be given to the winner, in consideration of the bet being treated as wiped out and no complaint being made of the failure to pay it promptly in cash, might not be shown to be sued for as " won on a wager." If such a situation were to arise it would be for the judge of fact to decide whether this was or was not the case. But on the evidence in the present appeal it was plainly the sum won on wagering that it was sought to compel the appellant to pay. That, in my opinion, is a claim which under the second limb of s. 18 cannot be enforced by legal proceedings, notwithstanding the new agreement, and consequently in my opinion the appeal should succeed.

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(1) 2 Ex. D. 422, 429. (2) Ibid. 428.

LORD GREENE. My Lords, s. 18 of the Gaming Act, 1845, by its first branch makes gaming and wagering agreements null and void. Such contracts therefore are struck with invalidity at the outset, i.e. before the event contemplated by the wager has occurred. The appropriate consequence of this enactment would be relief before the event by way of declaration and perhaps an order for delivery up of a written agreement as well as relief after the event by way of dismissal of an action to recover a sum won. The second branch is different. It is concerned with a state of affairs which can only arise after the event. What it prohibits is the bringing of any suit "for recovering any sum of money or valuable "thing alleged to be won upon any wager." The first argument on behalf of the respondents is that the second branch merely repeats, in language appropriate to procedure, what has already been enacted as a matter of substantive law by the first branch and is in effect tautological.

I am unable to accept this argument. I need not cite authority for the proposition that prima facie every word in an Act of Parliament must be given an effective meaning of its own. Whether or not the legislature in any given case has condescended to tautology is a question the answer to which depends upon the language used, but in the absence of an appropriate context one statutory provision which is expressed in entirely different language from another, whether in the same or a different section, is not to be interpreted as repetitive or unnecessary. Here the language of the first branch is entirely different from the language of the second branch. Under the first branch the agreement is a nullity before the race is run. The second branch assumes the race to have been run and the bet to have been lost. It is true that the language of the second branch would prohibit the bringing of an action upon a wager which had been won. To that extent I agree that it covers ground already adequately covered by the first branch. But this is no justification for limiting the words of the second branch as suggested. They are quite general and when read in their ordinary meaning they extend to any action to recover money alleged to be won on a wager. A competent draftsman would have used very different words if all that he had been instructed to prohibit had been an action on a contract rendered null and void by the first branch. In support of the argument that the second branch is in effect tautological, reliance is placed on certain authorities of which I need only refer to two. In neither of them did the question with which we are concerned arise: in neither of them was its solution necessary to the decision. If the observations relied on are to be understood as intended to apply to such a case as the present, they are dicta only and, in my opinion, incorrect. These cases are *Varney* v. *Hickman* (1) and *Diggle* v. *Higgs* (2). Both were concerned with the third branch of the section which prohibits the bringing of an action to recover money deposited with a stakeholder to abide the event of a wager. In the former the event had not happened and one of the parties sought to recover his deposit: in the latter it has happened but, the stakeholder not having yet paid over the money deposited, the loser sought to recover his part of it from the stakeholder. In each case the plaintiff succeeded since the court construed the third branch as applying only to a claim against the stakeholder by the winner of the wager. In the former case Maule J. said (3) that "the "second branch is involved in the first; that is to say that, "if the section had stopped at the end of the first branch, it "would have followed that no action could be brought to "enforce a contract so declared to be void." This appears to me to be no more than a statement that, as regards the enforcement of contracts declared to be void by the first branch, the second branch carries the matter no further. This is far from having the implication suggested on behalf of the respondents. The question is, is the second branch confined to such actions or does it extend to other actions as well? The language used makes it, in my opinion, impossible to confine it in the manner suggested. I find myself in complete agreement with what was said on this topic by Fletcher Moulton L.J. in *Hyams* v. *Stuart King* (4): "It provides with complete generality that no "action shall be brought to recover anything alleged to be "won upon any wager, without in any way limiting the "application of the provision to the wagering contract itself." In *Diggle* v. *Higgs* (5), Bramwell L.J. said: "I only wish "to add that the clause of s. 18 that 'no suit shall be brought

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(1) 5 C. B. 271.
(2) 2 Ex. D. 422.
(3) 5 C. B. 271, 280.
(4) [1908] 2 K. B. 696, 713.
(5) 2 Ex. D. 422, 429.

" 'for recovering money won upon a wager' is unnecessary " and might have been left out of the statute; it seems to me " to be wholly superfluous." This dictum is, in my opinion, incorrect. On the construction of the section, therefore, I come to the conclusion that the second branch means what it says and is not confined to actions where the agreement sued upon is the wagering agreement itself. As I shall hope presently to show, the agreement here alleged, sued upon and proved, is an agreement to pay money won on a wager. The promise which it is sought to enforce is a promise to pay that money and nothing else.

My Lords, much confusion appears to me to have arisen in this class of case through a failure to recognize that the question is not to be answered by finding a new consideration moving from the winner of the wager. Such a consideration from the point of view of contract law apart from the Act would indeed be sufficient to support a promise to pay unpaid bets. But the Act, as I interpret it, directs the court to look at the nature and true subject matter of the promise given in exchange for that consideration by the loser. If that promise is one which the Act forbids the court to enforce, it matters not how new or how valuable the consideration moving from the promisee may be. An early example of this confusion is to be found in the case of *Bubb* v. *Yelverton* (1). I am unable to accept or indeed to follow the reasoning of Lord Romilly M.R. in that case. He says (2): " Here there was a perfectly good " consideration quite ulterior to and independent of any racing " debt." As a bald statement of the goodness of the consideration moving from the winner I can agree with this. If it means that the promise given by the loser in exchange for that consideration is " ulterior to " (whatever that may mean) " and independent of any racing debt " it is completely at variance with the facts as found. The bond on which the action was brought was given in part payment of wagering debts as appears without the possibility of doubt from the statement of facts. What was the promise but a promise secured by bond to pay a wagering debt? I cannot see. The fact that the sum which the betting creditors were willing to accept was, as it seems, less than the full amount of the bets lost does not in the least affect its character. A sentence in the judgment which is often quoted appears to me when it is analysed to be of no assistance and indeed calculated to mislead. The Master of the Rolls said of the bond (2) that it was given

(1) L. R. 9 Eq. 471. (2) Ibid. 474.

"not to pay racing debts but to avoid the consequences of "not having paid them." The best way of avoiding the consequences of not having paid racing debts is to pay them; and the promise of the loser was merely a promise to do so. The fact that it was given to avoid the consequences of not having paid the debts cannot, as I see it, convert it into a promise of a different character. A method of avoiding a similar difficulty commended itself to the majority of the Court of Appeal in *Hyams* v. *Stuart King* (1) without, indeed (as Fletcher Moulton L.J. pointed out (2)), either any finding of the trial judge to support it, any pleading on which it could be based, any facts sufficient to raise it or any argument of counsel advocating it. It consisted in saying that the promise of the loser was to pay not the bet but "a certain sum of money "to avoid the consequeces of not having paid the racing "debts" (per Gorell Barnes P. (3) echoing the language of Lord Romilly M.R. in *Bubb* v. *Yelverton* (4).) Farwell L.J. elaborated this theory. He said (5): "Here the agreement "sued on is an agreement to pay a sum of money in consideration of forbearance to post the defendant as a defaulter; "the sum of money may be equal to or less than the lost bet, "but it is not payment of the bet,"—I pause here to call particular attention to the reason given by the learned Lord Justice—it is "because that [i.e. the bet] was payable on "settling day . . . .; the contract not to post . . . . is "sufficient to support a promise to pay money, which, though "equal to the amount of the bet is not in fact the bet, but is "compensation for its non-payment." It appears to me that Fletcher Moulton L.J. gave unanswerable grounds (which I do not delay to cite) for rejecting this reasoning. I only propose to add one sentence, viz. that, just as in the case of an ordinary debt paid after its due date, payment of a bet is no less payment of a bet because settling day is past; and to say that the passing of settling day by some mysterious alchemy transmutes a promise (unenforceable by statute) to pay an unpaid debt into an innocent promise (unaffected by the statute) to pay an equivalent sum of money appears to me, with the utmost respect to the memory of Farwell L.J., to shut one's eyes to reality and to permit an unwarrantable evasion both of the language and of the spirit of the statute.

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(1) [1908] 2 K. B. 696.
(2) Ibid. 717–8.
(3) Ibid. 704–5.
(4) L. R. 9 Eq. 471, 474.
(5) [1908] 2 K. B. 696, 728.

The reasoning of Gorell Barnes P. on this topic appears to me to be inconsistent with the facts as stated by him. The only promise found was a promise to "pay every farthing "that was owing" (1)—a clearer promise to pay an unpaid bet and nothing but an unpaid bet I cannot myself imagine. Again, the promise (and the only promise) alleged by the plaintiff is stated to be "a promise for good and fresh con-"sideration to pay the balance claimed by him" (2). What is this but a promise to pay the unpaid balance of the bets? I cannot see. As *Hyams* v. *Stuart King* (3) is really the respondents' sheet anchor I should, I think, add the statement that in the judgment of Farwell L.J. there is a similar inconsistency. He says (4) the promise was "to pay the 108*l*. 10*s*. "by instalments as soon as the firm got the money." The 108*l*. 10*s*. was the unpaid amount of the bet and nothing else. Again he says (4) that there was nothing illegal in the winner's agreement not to expose the loser "in consideration of the "payment of the amount lost."

In the present case the promise sought to be enforced is alleged (as it was bound to be alleged if the pleading was to accord with the facts) to be a promise to pay unpaid bets. The agreement alleged is "an agreement between the plaintiffs "and the defendant on August 20, 1946." It is not disputed that the reference is to the appellant's letter of August 20, 1946, which must be treated as incorporated in the pleading and must be construed in the light of the other documents directly or indirectly referred to in it. Those documents are the respondents' letter of August 17, the appellant's letter of August 15, and the order of Tattersalls' committee made on July 22. It is unfortunate that this order was not produced at the trial. It was a relevant document for the purpose of construing the claim, and the learned trial judge should have insisted on its production. However, we have sufficient material to enable us to know what was the substance of its contents. These various documents make it to my mind clear beyond controversy that the promise sued upon as alleged in the statement of claim was a promise to pay the unpaid balance of a betting account in accordance with the committee's order subject to certain immaterial modifications which were agreed between the parties. As stated in para. 6 of the respondents' case, the order of the committee was an order to pay in the manner and at the times therein mentioned the bets outstanding on the account.

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(1) [1908] 2 K. B. 697.
(2) Ibid. 701.
(3) Ibid. 696.
(4) Ibid. 725.

Counsel for the respondents put as his first argument the limited view which I have already rejected as to the meaning of the second branch of the section. Under this head he claimed that even if the appellant's promise was to be regarded as a promise to pay unpaid bets the second branch did not invalidate it. If he were wrong on this he submitted as an alternative argument the theory that was evolved in *Bubb* v. *Yelverton* (8) and *Hyams* v. *Stuart King* (6) that the promise was a promise to pay not unpaid bets but an amount equal to the unpaid bets. He argued that the bets played no more than a historical role and formed no necessary part of the allegation on which the claim in the action was founded: that the word "alleged" in the second branch of the section means alleged as a material allegation, and that if the allegation in the pleading was an allegation of an agreement to pay the unpaid bets as such, that allegation was in that respect immaterial and could be ignored, leaving the pleading to be read as alleging a promise to pay a sum of money at large. Apart from the casual method of treating a pleading which this argument involves, I am quite unable to accept it. The obligation of honour to pay the bet was not a mere matter of history leading up to the promise sued upon: it was, as I see it, the actual subject matter, both in language and in substance, of the promise. Payment of the debt of honour was the only matter with which Tattersalls' committee—itself in this regard a court of honour and nothing more—was concerned. It was, as I have explained, the only thing which the committee ordered the appellant to discharge. I am unable to follow the reasoning which would transform this debt of honour into something else. I can find no evidence to support the view that any such transformation took place; on the contrary, all the evidence is the other way. Nor do I think that it would have been permissible for the respondents to recast their pleading by alleging an agreement not, as now pleaded, to pay the outstanding bets, but to pay a sum at large. No such amendment was asked for nor, in view of the only evidence in the case, could it have been granted. If inquiry is made, when did such a transformation take place, the only answer suggested was that it took place in and by virtue of the order

(1) L.R. 9 Eq. 471. (2) [1908] 2 K. B. 696.

of the committee. I have already given my reasons for thinking that the order of the committee did nothing more than order the payment of the bets with which alone, as a court of honour, it was concerned.

My Lords, I do not myself feel any real doubt as to the meaning of the word "alleged" in the section. The context in which it occurs is concerned with the bringing of a suit: and in such a context I should expect the word "alleged" to mean, alleged for the purposes of the suit, i.e., alleged in the declaration in which the claim is set forth. In the year 1845 when the Act was passed the rules of pleading were more strictly observed than they are to-day. Implicit in the second limb of the section is a direction to the court not to entertain a suit of the nature indicated; a pleading based on the allegation mentioned was not only made demurrable but the court of its own motion must decline to allow an action based upon it to proceed. This, as it seems to me, makes it of vital importance to ascertain the nature of the agreement alleged. I agree that the word "alleged" must mean "alleged "as a matter of material relevance." But, in pleading an agreement, it must always be material to allege the real consideration; a failure to prove it means either (1) that the action must fail or (2) that it can only succeed if the pleading is amended, which in an ordinary case the court might properly allow. But, in a case covered by this limb of the section, if on the face of the pleading the agreement alleged is an agreement not to pay the unpaid amount of a wager but to pay a sum at large and if at the trial the only agreement proved is in fact an agreement to pay the unpaid amount of a wager, no amendment setting up the real agreement as proved would be permissible since it would convert the action into a prohibited suit. The action in such a case would therefore fail not because the section forbade it (since on the face of the pleading the allegation would have been an innocent one) but because the plaintiff had failed to prove the agreement alleged and was prevented by the section from amending his pleading so as to allege the agreement which was actually proved.

If the two parties to a wagering agreement make a subsequent agreement by which for consideration the loser promises to pay his losses to the winner, that and nothing else is the agreement which must be pleaded. In such a case if the winner alleges instead an agreement to pay a sum at large, he will be alleging an agreement different from that which in truth was made and his action will fail. Not only does the prohibition contained in the second branch of the section itself require the court to satisfy itself as to the true nature of the sum sued for but the two allegations are quite different. This can be seen from the fact that apart from the application of the Gaming Act different defences would be open to the defendant. For example, where the agreement was to pay the amount lost on a wager it would be a good defence that the wager was not in fact lost. No such defence would be relevant in an action on an agreement to pay a sum at large. I am unable to accept the view that the true nature of the agreement relied on is not a material allegation. I must not be understood as suggesting that there can never be a case where a promise by a defaulting backer given in consideration of a promise by the winner of the bet not to report the default may be enforced. A promise in order to be obnoxious to the second branch of the section must be a promise to pay the bet, and the prohibition relates only to recovery of money or a valuable thing alleged to be lost. The question what is the agreement really come to is a question for the tribunal of fact which will not be deceived by any specious attempt to conceal the real nature of the promise. If the loser in terms agrees (as was found by the majority in *Hyams'* case (1)) "if you "will refrain from reporting me I promise to pay a sum of "money equal to the amount of the bet which I lost to you," I have difficulty in thinking that a tribunal of fact would regard the promise as being anything but a promise to pay the bet. It would indeed be strange if the consequences of the section could be evaded by so patent and artificial a device.

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(1) [1908] 2 K. B. 696.

(2) L. R. 9 Eq. 471.

In the result I am of opinion that this appeal should be allowed and that *Bubb* v. *Yelverton* (2) and *Hyams* v. *Stuart King* (1) should be overruled.

Lord Normand. My Lords, this appeal from a judgment to the Court of Appeal affirming a judgment of Hallett J. raises an interesting question on the law of betting in that it involves a re-consideration of *Hyams* v. *Stuart King* (1) and of certain earlier authorities on which the decision in that case was based.

From the facts it is clear that the contract which is the

(1) [1908] 2 K. B. 696.

(2) L. R. 9 Eq. 471.

ground of action is not itself a betting contract and that the consideration given by the respondents for the appellant's obligations under it was their refraining from enforcing the order made by Tattersalls' committee on July 22, 1946. This was a consideration the nature of which I should explain. The functions and procedure of Tattersalls' committee are described in the judgment of Hallett J. which may be supplemented by statements in the cases of the parties. It appears that it is open to anyone alleging that he has won a bet from another on horse racing and that he has not been paid by the date of settlement to report the matter to Tattersalls' committee. The committee then holds an inquiry at which evidence may be taken, and decides whether a bet has been lost and, if so, of what amount. It may then make a written order for payment on terms and by instalments. Up to this point that was the procedure followed in the present case. If the loser fails to make payments in compliance with the committee's direction, the next step is that the creditor may report the default to the committee and request it to send to the defaulter a letter described as " the usual ten day letter," calling on the defaulter to comply with the commttee's order within ten days and stating that if he fails to comply the committee will report him to the Stewards of the Jockey Club. If that is done the automatic result is that the defaulter is warned off Newmarket Heath and is thereby precluded from entering a horse for any race or appearing on any race course controlled by the Stewards of the Jockey Club and, in effect, from placing any further bets on race horses. He also incurs a serious social stigma. The whole procedure is therefore a means of compelling payment of lost bets by social sanctions.

The defence to the suit is that the claim is to recover a sum of money won upon a wager within the meaning of s. 18 of the Gaming Act, 1845, and by this defence the appellant challenges the decision in *Hyams'* case (1) which the courts below have followed in construing s. 18. The section enacts " that all " contracts or agreements, whether by parole or in writing, " by way of gaming or wagering, shall be null and void; and " that no suit shall be brought or maintained in any court of " law or equity for recovering any sum of money or valuable " thing alleged to be won upon any wager, or which shall have " been deposited in the hands of any person to abide the " event on which any wager shall have been made: provided

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(1) [1908] 2 K. B. 696.

"always, that this enactment shall not be deemed to apply "to any subscription or contribution, or agreement to subscribe "or contribute, for or toward any plate, prize, or sum of money "to be awarded to the winner or winners of any lawful game, "sport, pastime, or exercise." The section divides into three branches. The first branch affects with nullity all gaming and wagering contracts and agreements, but, as I have said, the contract which is the foundation of the suit is not a wagering contract. There had been wagering contracts between the parties but the wagers had been lost and won before the formation of the contract on which this action is founded. It is, however, not on the first branch that the appellant bases his defence. He relies on the first part of the second branch, and his contention is that the sum which he has contracted to pay is a sum alleged in the claim to be won upon a wager, and therefore that the suit falls within the express terms of the enactment. This contention does not in any way depend on an illegality or defect in the formation of the contract, and it is conceded that the contract was for a good and fresh consideration untainted with any illegality. The respondents' contentions are first, that the sum which the appellant promised to pay is no longer money won upon a wager but is a sum of money at large due under a lawful and enforceable contract; and second, that even if the sum is to be regarded as a sum won upon a wager, it is nevertheless recoverable, because the second branch of s. 18 is throughout concerned only with suits seeking to enforce the gaming and wagering contracts or agreements dealt with in the first branch.

It will be convenient before dealing with these contentions to take account of *Hyams'* case (1). The facts in that case were that betting transactions between the parties, who were bookmakers, resulted in the defendant's giving of a cheque to the plaintiff for the amount of bets lost to him. At the defendant's request the cheque was held over by the plaintiff and part of the amount of the cheque was paid by the defendant. Subsequently a new oral agreement was come to by which the defendant promised to pay the balance in a few days in consideration of the plaintiff's holding over of the cheque for a further time and refraining from declaring the defendant a defaulter and so injuring his business. The balance was not paid and the plaintiff therefore issued a writ by the indorsement of which he claimed the balance due to him on account stated. At the trial the plaintiff was allowed to set up the fresh agreement and he was held entitled to recover. On appeal the majority of the court, Gorell Barnes P. and Farwell L.J. affirmed the judgment. Fletcher Moulton L.J. dissented. The ground of Sir Gorell Barnes' judgment is that, though the mere giving of time to pay that which cannot be enforced does not amount to consideration, the plaintiff's refraining to declare the defendant a defaulter was good and lawful consideration and that the new contract was a good and enforceable contract. He followed the earlier decisions of *Bubb* v. *Yelverton* (1) and *In re Browne. Ex parte Martingell* (2), to which I shall later make reference. Gorell Barnes P. did not deal directly with the meaning and effect of the provision in s. 18 that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, but he cited it and I think that he regarded this provision as explicatory of the legal consequences of the enactment in the first branch of the section and as limited in its scope to wagering contracts and agreements. Farwell L.J. agreed with the President in the result, but in some respects his reasoning was different. He first disposed of an argument for the appellant that the use of extra-legal remedies, such as posting a defaulter in order to enforce payment of a debt of honour, savoured of blackmail. The learned Lord Justice rejected this argument on the unanswerable ground that no wrong is done if an aggrieved party makes use of the ordinary means allowed by society to compel the loser to pay his debt of honour. He then said that he regarded the lawfulness of the consideration moving from the plaintiff as the gist of the case. His reason was that a debt of honour, though of imperfect obligation, becomes enforceable if another and distinct legal consideration can be established to support it. Thus the lawfulness of the new consideration alleged by the plaintiff became the crux of the case. If that consideration had been tainted with blackmail, the defendant's obligation would have been as unenforceable after the formation of the new contract as it was before it, but since it was free of all taint of illegality, the learned Lord Justice held that the defendant's obligation was perfected and enforceable. Though that is the ratio of his judgment, I must refer to some other observations not easily reconcilable with it. He said (1): "Here the agreement "sued on is an agreement to pay a sum of money in con-"sideration of forbearance to post the defendant as a defaulter; "the sum of money may be equal to or less than the lost bet, "but it is not payment of the bet, because that was payable "on settling day, and non-payment on that day made the "loser a defaulter and liable to be posted." This is the only passage in the majority judgments which seems to be specifically directed to the argument that the suit was not maintainable because it was, notwithstanding the fresh consideration, an attempt to recover a sum of money alleged to be won by a wager. Though that argument was not submitted by the defendant in *Hyams'* case (2), it was the basis of the dissenting judgment of Fletcher Moulton L.J. On the facts he held that the promise sued on was a promise to pay the bet and nothing else or different, and that the real intention of the parties was that the bet should be paid. On the construction of s. 18 he held that the provision that no suit shall be brought or maintained in any court of law or equity for recovering any sum alleged to be won upon a wager was not in effect merely a repetition of or explicatory of the preceding enactment that all contracts or agreements, whether by parole or in writing, by way of gaming or wagering shall be null and void. He based this construction not only upon the generality of the wording of the provision, but also on the ground that it would be idle to enact that no suit shall be brought upon a contract which the statute had already rendered void. In his consideration of the earlier authorities he expressed the opinion that the decision in *Bubb* v. *Yelverton* (3) in which Lord Romilly M.R. upheld the validity of a bond given for a sum of money admittedly in compromise for sums won on bets, had been influenced first, by an argument based on the language of the Statute of Anne (9 Anne, c. 14) and the amending statute, the Gaming Act, 1835, which seemed to place bonds in a special and peculiar position by reason that they are not named in the amending section, although they are named in the repealing section; and, second, by the fact that there would be a serious loss to the estate of the party who had made the bets if they were not paid or compromised. He added that these special circumstances did not, in his judgment, justify the decision. On the other hand, he

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(1) [1908] 2 K. B. 696.

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(1) L. R. 9 Eq. 471.

(2) [1904] 2 K. B. 133.

(1) [1908] 2 K. B. 696, 728.
(2) Ibid. 696.
(3) L. R. 9 Eq. 471.

gave reasons for allowing that the decision in *In re Browne. Ex parte Martingell* (1) might be justified on its special circumstances. In that case bills to the amount of a betting debt were given in consideration of the withdrawal of a letter of complaint which had been sent to the committee of the defaulter's club, and Buckley J. held that these bills were not for the bet but for a wholly new consideration and were valid. "If," said Fletcher Moulton L.J. (2), "this means that the "judge found as a fact that the bills were not in payment of "the bets, but were simply the price of the withdrawal of "a letter of complaint that had actually been sent, there is "ground for saying that the case had nothing to do with the "laws against gaming and therefore laid down no principle "with regard to them." He also considered that *Goodson* v. *Baker* (3) was wrongly decided. In that case there was no evidence of any fresh consideration, since all that the bookmaker had done or promised was to extend the time for payment without agreeing to refrain from posting the loser as a defaulter.

The first issue to be decided is whether the sums sued for in the present case and in *Hyams'* case (4) were moneys won upon a wager. So far as *Hyams'* case (4) is concerned, there is, I think, no room for doubt. The sum sued for was in fact the balance due on a bookmaking account. The proposition that the money sued for was not the bet because the bet was payable on settling day, though it is supported by the high authority of Farwell L.J., is, if I may say so with respect, not maintainable. The payment of a sum due under a contract, though made after the due term, is nevertheless a payment in discharge of the debtor's obligation under the contract unless it contains special and exceptional terms. In the present case, the proceedings before Tattersalls' committee are an element which was not present in *Hyams'* case (4), but the order of that committee created no new obligation ; it was an order for the payment of the wagering debt, the same in amount and the same in character. And in my opinion, the promise made in the contract alleged in the claim is a promise to pay money won upon a wager or wagers, though the promise is new and the consideration for it is new. The terms of the contract expressly establish that the promise to pay is a promise to comply with the order of Tattersalls' committee subject to

(1) [1904] 2 K. B. 133.
(2) [1908] 2 K. B. 696, 721.
(3) (1908) 98 L. T. 415.
(4) [1908] 2 K. B. 696.

modifications of date, and that the sum to be paid is the balance of the bookmaking account, including the sums won on bets on dog racing which were not included in the order of Tattersalls' committee. I think therefore that the appellant has succeeded in showing that in the literal meaning of the words this is a suit for recovering sums alleged to be won upon a wager. By averring the contract the plaintiff incorporated in his allegations its terms and these terms disclose that the sum promised was won by betting.

The respondents' construction of s. 18 fails in my opinion to account for the words "recovering any sum of money or "valuable thing alleged to be won upon any wager." It treats them as a periphrasis for "enforcing any such contract "or agreement." On the other hand, the appellant's construction gives effect to the words according to their normal and ordinary meaning. The purpose of this part of s. 18 is not to strike a second and an unnecessary blow at contracts and agreements already stricken with nullity, but to strike at any suit for recovering money or valuables won by wagering. The language is appropriate for that purpose and it is a purpose which is a logical sequel and reinforcement of the first branch of the section. The legislature cannot have been unmindful that a provision making gaming and wagering contracts and agreements null and void might be rendered nugatory by additional promises or covenants given or entered into for security or in satisfaction of money lost by gaming and wagering. The preamble to the Act of 1845 shows that such supplementary promises and covenants were familiar to Parliament.

In the debate the word "alleged" was much canvassed. In the present case it gives rise to no difficulty because, as has already been said, the plaintiff himself alleged a contract from which it appears the sum sued for was won upon a wager. My noble and learned friends Lord Simon and Lord Greene have explained in their speeches why the word "alleged" may have been inserted in the section by relating it to the rules of procedure which were in force in 1845. Under the old procedure the plaintiff failed in his claim if he alleged that the sum sued for was won on a wager, or if he alleged another ground of action, but it was proved that the sum sued for was won upon a wager. Under the present procedure the result will still be the same in either of the cases figured. Even so, there may yet be cases, of which *In re Browne. Ex parte*

Martingell (1) is an example, in which a difficult question will have to be decided on the facts, whether the contract before the court is in truth a contract for the payment of a wagering debt or a contract in which the loser of a wagering debt has bound himself to pay a sum of money of a different character.

The respondents cited a series of authorities concerned with the second part of the second branch, that is the provision that a sum of money deposited in the hands of a person to abide the event on which any wager shall have been made is irrecoverable. It will be sufficient to refer to two of these cases. In *Varney* v. *Hickman* (2), it was held that the money deposited with a stakeholder can be recovered by a party repudiating the wager before the event on which it depended was determined. The ground of the decision was that the provision dealing with stakeholders was aimed at preventing the winner of a wager enforcing payment and was thus in line with the legal results of the first branch of the section; but Maule J. (3) referred also to the first part of the second branch and he said that it was involved in the first branch of the section and that if the section had stopped at the end of the first branch it would have followed that no action could be brought to enforce a contract so declared to be void. Cresswell J. (4) similarly said that the provision might be superfluous or it might have been enacted ex abundanti cautelà. In *Diggle* v. *Higgs* (5), the plaintiff was held entitled to recover from a stakeholder, after the determination of the match, but before the money had been paid over to the winner. In that case Bramwell L.J. (6) gave it as his opinion that the provision that "no suit shall be brought for recovering money "won upon a wager" is unnecessary and might have been left out of the statute. These dicta on the meaning of the first part of the second branch of s. 18 are not essential to the conclusion and the decisions do not in my opinion involve a construction by which the words "any sum of money . . . . "deposited in the hands of any person to abide the event on "which any wager shall have been made," become tautological or merely expository of the necessary legal consequences of the first branch of the section. These decisions therefore do not help the respondents. But the dicta which I have cited are weighty, coming as they do from judges of great eminence, and it is on them rather than on the decisions that the respondents rely. I think, however, that the construction of the words "no suit shall be brought . . . . for recovering "any sum of money or valuable thing alleged to be won upon "any wager" was not raised in the cited cases in such a way as to bring before the court the kind of question which has arisen in the present case, and that a decision of the appeal cannot safely be rested on the dicta. *Hough* v. *Windus* (1) also cited by the respondents, has little relevance to the case. It illustrates the familiar principle that the rule that that construction is to be preferred which gives meaning to each word of a written instrument, is not unbending but may yield to a more compelling rule where there is a conflict between them. In the case cited it was held that a statute should not be so construed as to give it a retrospective effect even if the result were that some word or words must be treated as superfluous. A consideration of these authorities appears to me to leave unimpaired the ratio of the dissenting judgment in *Hyams'* case (2) that the first part of the second branch of s. 18 provides with complete generality that no action shall be brought to recover anything alleged to be won on any wager, without in any way limiting the application of the provision to the wagering contract itself.

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(1) [1904] 2 K. B. 133.
(2) 5 C. B. 271.
(3) Ibid. 280.
(4) Ibid. 282.
(5) 2 Ex. D. 422.
(6) Ibid. 429.

I therefore reach the conclusion that the appeal should be allowed, that *Hyams'* case (2), *Bubb* v. *Yelverton* (3) and *Goodson* v. *Baker* (4) should be overruled, and that the dicta in *Varney* v. *Hickman* (5) and *Diggle* v. *Higgs* (6) should be disapproved. The view taken in *Bubb* v. *Yelverton* (3) has prevailed for eighty years, but it cannot be said that it has been tacitly recognized by intervening legislation, or that obligations with a tract of future time have been undertaken on the faith of it. The lapse of time is not therefore a sufficient reason for refusing to give effect to what appears to be the true construction of the statute.

Before parting from the appeal I would refer to the Scotch case, *Robertson* v. *Balfour* (7). I have no doubt that that case was rightly decided. But the common law of Scotland on gaming and wagering differs greatly from the common law of England. In Scotland it is settled law that wagering agree-

(1) 12 Q. B. D. 422.
(2) [1908] 2 K. B. 696.
(3) L. R. 9 Eq. 471.
(4) 98 L. T. 415.
(5) 5 C. B. 271.
(6) 2 Ex. D. 422.
(7) 1938 S. C. 207.

ments, being "sponsiones ludicræ," are matters with which the court ought not to occupy itself; whereas by the common law of England the ordinary wagering agreement dependent on the result of horse racing and similar events was enforceable by the courts. Apart from that vital difference, there is in Scotland no need for consideration to support and render enforceable obligations not under seal. Moreover the Gaming Act, 1845, does not apply to Scotland. It is obvious, therefore, that neither the decision in *Robertson* v. *Balfour* (1) nor the dictum of Lord Mackay for which the case was cited, can be of any assistance in the present case.

Lord Oaksey. My Lords, in my opinion the cases of *Bubb* v. *Yelverton* (2) and *Hyams* v. *Stuart King* (3) were rightly decided and this appeal should therefore be dismissed.

An agreement by way of wagering has never been illegal. By s. 18 of the Gaming Act, 1845, it was made null and void but not illegal. A legal nullity can have no legal effect; it creates no taint in money derived from it. But it is argued that the words which follow the declaration of nullity, "and "no suit shall be brought or maintained in any court of law "or equity for recovering any sum of money or valuable "thing alleged to be won upon any wager, or which shall have "been deposited in the hands of any person to abide the event "on which any wager shall have been made:" make it impossible to enter into a binding legal contract in reference to the sum of money won under the wagering agreement. In my opinion the words of the section have no such meaning. It cannot be denied that apart from the section it was perfectly legal for one person to enter into a contract which would be enforceable to pay any sum of money in consideration of a promise by another person to refrain from doing something which he was entitled to do.

Now there is nothing illegal or even defamatory in making a truthful report to Tattersalls' committee, but its consequences may be very serious indeed to the bettor, for he and his horses may be warned off Newmarket Heath and all racecourses which are conducted under the Rules of Racing. How serious this result may be was exemplified in the case of *Bubb* v. *Yelverton* (4) for, as Lord Romilly said: "He [the defaulter] "was compelled to do so by the circumstance that Mr. Steel

(1) 1938 S. C. 207.
(2) L. R. 9 Eq. 471.
(3) [1908] 2 K. B. 696.
(4) L. R. 9 Eq. 471, 475.

" and Mr. Nicholls would have taken steps respecting him " with the Jockey Club, which would not only have been " exceedingly painful to him, but would besides have involved " him in very serious and considerable pecuniary liabilities."

In my opinion it would require the clearest possible words in a statute to render such a contract unenforceable and to prevent a man who has done nothing illegal but has merely been unable for the time being to pay a betting debt from protecting himself from results which may be as disastrous to him financially as they may be socially. That in my view is the true way in which to consider the matter. Why cannot a man who cannot pay his betting debt protect himself by making a promise to pay for good consideration ? An action brought upon such a promise is not in my opinion an action to recover the sum of money won upon a wager but an action to recover a sum of money due upon a lawful contract. It is in my view begging the question to say that it is an action to recover a sum won upon a wager because the sum of money due upon the contract may be the same in amount as the sum won on the wager. Suppose the sum is different or suppose instead of a sum of money the contract is to hand over a motor car or some other " valuable thing," a racehorse for instance, in consideration of not being reported and having all the bettor's horses rendered valueless ; is the court to consider the amount of the consideration and if it comes to the conclusion that the motor car or other valuable thing is of equal value with the amount of the bet refuse to enforce the contract ? In my opinion the appellant's argument cannot be sustained unless it is held that no enforceable contract can be made by a defaulter which involves any part of the amount lost on the bet. The argument appears to be based upon the Chancery doctrine of following trust moneys notwithstanding that there is no reference to the doctrine, no fiduciary relationship between the parties and no legal taint in the money.

If one turns to the words of the section there appears to me to be no such provision. The part of the section in question is speaking in legal terminology " suit," " recovering," " alleged." Such words in my view refer to the cause of action, and prohibit a suit the cause of which is the breach of an agreement by way of wager ; in such an action it would be necessary for the plaintiff to allege the wager as the cause of action : in the present action it is not ; the present action is to recover a sum

H. L. (E.)

1949

HILL v. WILLIAM HILL (PARK LANE) LD.

Lord Oaksey.

of money due upon an entirely different contract which apart from the suggested meaning of the section has all the characteristics of a legal contract. It is said that on this view this part of the section is tautologous and that every word in a statute should be given a meaning. By many eminent judges this part of the section has been considered tautologous and such an objection is in my view nothing when compared with an interpretation which places a defaulter in the position to which I have alluded. Moreover, the appellant's construction gives no intelligible meaning to the word "alleged." It was suggested in the course of the argument that the word "alleged" was satisfied by the fact that the writ in the present case referred to the facts of the case and included a reference to the account between the backer and the layer. But the question is what does the word "alleged" mean in the section and it appears to me that the allegations of the particular pleader in the present action have no bearing upon that meaning. In my opinion the word "alleged" means alleged by the plaintiff and necessarily alleged as material to the action of which the section is speaking.

In the present case it was only material to allege the appellant's promise to pay in consideration of not being reported; it was quite irrelevant to allege that the sum promised to be paid had been promised to be paid on a previous occasion in a wager.

The law as I have stated it has stood since the year 1870 and the legislature has never seen fit to alter it. With the greatest respect to those of your Lordships who take a different view, I am of opinion that that is a very good reason for giving the same interpretation to words which are at any rate so far ambiguous that they received that interpretation from the Master of the Rolls in 1870 and from the President of the Probate Division and Farwell L.J. in 1908. Since writing this opinion I have had the advantage of reading the opinions of the Lord Chancellor and of Lord Radcliffe in print and I agree with their reasons.

LORD MACDERMOTT. My Lords, the main question raised in this appeal—and on the view I take it is unnecessary to go beyond it—is whether the action brought by the respondents against the appellant is struck at by s. 18 of the Gaming Act, 1845. Omitting the proviso which is not, in my opinion, of assistance in the determination of this question, the section may be regarded conveniently, though perhaps not very grammatically, as consisting of three parts or branches. Set out so as to mark this division it reads thus:

> "All contracts or agreements, whether by parole or in "writing, by way of gaming or wagering, shall be null and "void;
>
> "and no suit shall be brought or maintained in any court "of law or equity for recovering any sum of money "or valuable thing alleged to be won upon any wager,
>
> "or which shall have been deposited in the hands of any "person to abide the event on which any wager shall have "been made:
>
> "Provided . . . ."

My Lords, it is plain that the present suit was not brought upon any of the numerous wagers which were made between the parties and as the result of which the appellant had lost to the respondents by the month of April, 1946, the sum of 3,835*l.* 12*s.* 6*d.* The suit was brought instead on an agreement made in August, 1946, after the appellant had defaulted in this sum. By it the appellant undertook to give the respondents his cheque for 635*l.* 12*s.* 6*d.*, post-dated to October 10, 1946, and to pay the balance of their account by monthly instalments of 100*l.* commencing in November of the same year. The respondents, on their part, agreed to payment as thus promised and in consideration therefor, as the learned trial judge has found, undertook to refrain from following up the procedure with Tattersalls which had then been commenced and which, if continued, would inevitably have led to the appellant being posted as a defaulter and warned off Newmarket Heath. It is also clear that the relevant wagers between the parties, though void under the first branch of the section, were not illegal. The August agreement stands on a somewhat different footing. The antecedent transactions were not such as to taint it with illegality and it was not illegal in itself; but it lay outside the first branch of the section and has not been avoided thereby. So much, indeed, was conceded on behalf of the appellant, but he contended, and it is the substance of his case, that the August agreement was for payment of the lost wagers and, accordingly, that the respondents' suit, based as it was on this agreement, was brought to recover money won on wagers and was therefore within the prohibition enacted by the second branch of s. 18. To this two answers were made. First of all it was said that the suit was not brought to recover what had been won and, secondly, that the second branch of the section only related to proceedings on foot of contracts or agreements declared to be void by the first branch and so had no applicability to the present case.

My Lords, the first of these answers ignores what is, to my mind, the plain import of almost every relevant document in the case. There is nothing colourable or equivocal about the material provisions of the August agreement. The letters constituting it leave no room for doubt that the intention of the parties was that the betting debt should be discharged by means of the spaced payments therein detailed. This correspondence has already been examined and I need not go through it again. It can be sufficiently summarized by saying that on August 17, 1946, the respondents made it clear that they were prepared to take payment of their account for 3,835*l.* 12*s.* 6*d.* by a post-dated cheque for 635*l.* 12*s.* 6*d.*, with monthly instalments thereafter to clear the balance of 3,200*l.*, and that the appellant made it equally clear by his letter of August 20 that he would make these payments in discharge of the respondents' account. His purpose is but emphasized in the assurance concluding this letter that " as " soon as my financial position improves I shall do all I possibly " can to settle this account as soon as possible." The nature of the respondents' suit is equally unambiguous. The endorsement on the writ speaks for itself. It says : " The plaintiffs' " claim is for the sum of 700*l.* instalments in arrear and payable " by the defendant to the plaintiffs under an agreement " between the plaintiffs and the defendant on August 20, " 1946 " ; and this is followed by particulars setting out the instalments, as agreed in the correspondence, in so far as they had accrued and remained unpaid up to the commencement of the proceedings.

Now if one were to pause here and, looking only to the evidence, ask what the respondents sought to recover by this suit, I think the facts would admit of but one answer, namely, certain instalments of the amount of their betting account with the appellant. That, in the absence of any other consideration would settle this particular aspect of the case in the appellant's favour. It was, however, contended that the law justified a different conclusion and I must refer briefly to two of the authorities cited in support of this proposition.

In *Bubb* v. *Yelverton* (1), the claim in dispute was on a bond for 10,000*l.* given to secure the second instalment of a sum payable by the Marquis of Hastings under an agreement made by him with his betting creditors whereby the creditors agreed to accept the payments offered " in satisfaction of their " claims " and, as I read the report, to abandon proceedings before the Jockey Club which would have led to the Marquis being posted as a defaulter. Against the claim it was submitted, inter alia, that the proceeding was one to recover a debt due on a wager and so fell within the prohibition in s. 18. Lord Romilly M.R. held in favour of the claimants and in the course of his judgment—I refer only to what is material to the point under discussion—he said, speaking of the bond (2): " It is impossible to read the evidence without seeing that " it was given, not to pay racing debts, but to avoid the " consequences of not having paid them." This dictum was cited and applied by Buckley J. (as he then was) in *In re Browne* (3). There the betting creditor, having sued unsuccessfully to recover 800*l.* due in respect of bets which he had made and paid on behalf of the debtor, wrote complaining of the latter's conduct to the club of which they were both members. Subsequently they reached an agreement whereby, in consideration of the creditor withdrawing his letter of complaint, the debtor paid 100*l.* in cash and accepted four bills for 100*l.* each in the creditor's favour. The debtor having become bankrupt, the creditor sought to prove in respect of the bills and, despite the contention that they were really given in satisfaction of the old debt of 800*l.* and the concluding words of s. 1 of the Gaming Act, 1892—the enactment on which the original action had foundered—which say, that " no action shall be brought or maintained to recover " any such sum of money," the proof was allowed, Buckley J. observing that (4): " The bills were given for an altogether " new consideration, which was not an illegal consideration. " They were given, not to pay the gaming debt, but, as Romilly " M.R. said in *Bubb* v. *Yelverton* (1), to avoid the consequences " of not having paid it." I turn now to the decision of the Court of Appeal in *Hyams* v. *Stuart King* (5), on this particular point. I need not recite its facts. In so far as material they are not to be distinguished from those of the present case and

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(1) L. R. 9 Eq. 471.
(2) Ibid. 474.
(3) [1904] 2 K. B. 133.
(4) Ibid. 135.
(5) [1908] 2 K. B. 696.

H. L. (E.)

1949

HILL v. WILLIAM HILL (PARK LANE) LD.

Lord MacDermott.

there can be no doubt that if the Court of Appeal was right the appeal before your Lordships must fail. The majority judgments accept, I think without reservation, the distinction drawn by Lord Romilly in *Bubb* v. *Yelverton* (1). Farwell L.J., indeed, seems to develop it somewhat for he says (2) : " . . . . " the contract not to post . . . . is sufficient to support " a promise to pay money, which, though equal to the amount " of the bet, is not in fact the bet, but is compensation for its " non-payment, and the action cannot be said to be brought " for recovering any sum alleged to have been won on any " wager within 8 & 9 Vict. c. 109."

My Lords, when default is made in payment of a debt of honour the defaulter may well find himself willing to confer, it may be by gift or contract, some advantage upon the winner which he would not otherwise have thought of conferring. In contracts made in such circumstances it does not, in my opinion, necessarily follow that the consideration moving from the loser will always be a " sum of money or valuable " thing alleged to be won upon any wager " within the meaning of s. 18. In cases of doubt, I think the court must look to the reality of the transaction and come to a finding as to what the true intention was. Where the promise is to pay money it will generally, I think, be relevant to inquire whether the debt of honour is to be regarded as discharged by the payment; but the circumstances to be considered must, of course, depend on the facts of each instance. There is, however, neither need nor place for such an investigation where, as here, the terms of the agreement afford a plain answer unless it can be said that the observations of Lord Romilly, which I have quoted above, mark a reliable criterion capable of general application. In my opinion they do not do so. They sound in motive, and the subtle distinction which they draw seems to me at variance with the well-established principle that a man cannot modify the contractual intention to be deduced from his words or conduct by exposing what he had in the back of his mind. For this reason I doubt very much if *Bubb* v. *Yelverton* (1) and *In re Browne* (3) can be regarded as correctly decided even on their particular facts. But, however that may be, it follows, if I am right in the view expressed, that *Hyams* v. *Stuart King* (4) cannot be supported on the strength of these authorities; and without their aid it cannot be said that the new agreement on which the plaintiff in that case succeeded was such as, in itself, to justify the conclusion that the loser's promise was to pay, not the balance of the bet, but something different. In this connexion I need only refer to two passages in the majority judgments which go to show how little room there was in the agreement as there established for the refinement introduced by *Bubb* v. *Yelverton* (1). Gorell Barnes P., describes the consideration for the plaintiff's promise to give time and forbear to declare the defendants' defaulters as the undertaking of the defendants that (2): " . . . . they [the defendants] would pay him [the plaintiff] " on or before the expiration of that time the amount which " both parties considered was due to the plaintiff in honour, " though not by law"; and Farwell L.J. speaks to the same effect in summarizing the position thus (3): " A bet made by " the plaintiff with the defendant's firm, and lost by the " latter; a cheque for 108*l.* 10*s.* sent in payment on " November 4, a request on November 5 from the defendant's " partner to the plaintiff, acted on by the plaintiff, to hold " the cheque over and to refrain from publishing their default " to other bookmakers, and a promise in consideration thereof " to pay the 108*l.* 10*s.* by instalments as soon as the firm got " the money."

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(1) L. R. 9 Eq. 471.

(2) [1908] 2 K. B. 696, 728.

(3) [1904] 2 K. B. 133.

(4) [1908] 2 K. B. 696.

For these reasons I am of opinion that the respondents' first submission fails and that what they sought to recover in this suit was in truth and in fact a part of their betting debt.

Now as to the respondents' second submission. Does the second branch of s. 18 apply to the enforcement of the August agreement as I have found it to be, or is it limited to suits brought on the wagering contract itself? In *Hyams* v. *Stuart King* (4) the point is barely touched upon in the majority judgments which I think must be taken as founded in the main on the absence of illegality and the *Bubb* v. *Yelverton* (1) line of authority. The dissenting judgment of Fletcher Moulton L.J., takes the view urged on behalf of the appellant and deals with the matter at some length and more fully than it is dealt with in the earlier cases. These, however, contain dicta which clearly favour the respondents' contention that the second branch of the section is but a procedural echo of the first, reliance being placed in particular upon the observations of Maule J., in *Varney* v. *Hickman* (5); and of Lord Cairns L.C.,

(1) L. R. 9 Eq. 471.
(2) [1908] 2 K. B. 704.
(3) Ibid. 725.
(4) Ibid. 696.
(5) 5 C. B. 271.

and Bramwell L.J., in *Diggle* v. *Higgs* (1). The question is entirely one of construction and the following excerpts from two of the judgments just referred to will suffice to indicate the nature of the conflict of judicial opinion which must now be settled. In *Diggle* v. *Higgs* Lord Cairns says (2) : " The " section amounts to this : all contracts by way of gaming " and wagering are null and void ; and then, dealing with " those contracts, it says that no action shall be brought with " respect to them : that is to say, all gaming contracts are void, " and the winner of the game or wager shall not maintain " a suit against his antagonist or the stakeholder. This " construction makes one member of the section in unison " with the other." In *Hyams* v. *Stuart King* (3) Fletcher Moulton L.J., puts it thus, in contrasting what I have called the first and second branches : " The language of the later " provision is in my opinion much wider. It provides with " complete generality that no action shall be brought to recover " anything alleged to be won upon any wager, without in any " way limiting the application of the provision to the wagering " contract itself."

My Lords, the other sections of the Act of 1845 do not seem to me to give any assistance on the true meaning of s. 18. Nor have I been able to find much help in the legislative history of gaming and wagering. The enactments repealed by s. 15 of the Act of 1845 certainly formed a strict code and evince no obvious desire to let their prohibitions be evaded with the ease with which the first and second branches of s. 18 might be circumvented were the respondents' contentions to prevail. But as Lord Watson said in *Bradlaugh* v. *Clarke* (4), it is " an " extremely hazardous proceeding to refer to provisions which " have been absolutely repealed, in order to ascertain what the " legislature meant to enact in their room and stead," and I do not think any real weight can be attached to considerations of that kind. It is, however, legitimate and relevant to observe, for what it is worth, that in 1845 the legislature must be taken as aware of the practice of making agreements to pay wagering losses, for s. 3 of the statute 16 Chas. II c.7, which is repealed by s. 15 of the Act of 1845, struck expressly at that very thing.

The question for decision therefore hinges on the language of s. 18 and in particular on that of its second branch. So

(1) 2 Ex. D. 422.
(2) Ibid. 427.
(3) [1908] 2 K. B. 696, 713.
(4) (1883) 8 App. Cas. 354.

regarding it, I am unable to agree that either the second branch or the third is merely expository of the first. It may well be that the third only relates to the winner who seeks his winnings from the stakeholder; the point does not arise here and need not be further considered. But even if that be the case I find it hard to see why the third branch should be regarded as but a legal consequence of the first. In the ordinary course the stakeholder is not sued on the wagering contract, for he is not usually a party to it. He is sued for money had and received and the avoidance of the wagering contract without more does not give him a good answer to a claim by the winner. This, to my mind, disposes of much of the reasoning underlying the dicta in *Varney* v. *Hickman* (1) and *Diggle* v. *Higgs* (2) relied on by the respondents. It does not, of course, conclude the matter so far as the second branch is concerned, but it may, I think fairly, be said to weaken the case for treating that branch as adding nothing to the substance of the enactment.

My Lords, had the words "alleged to be" been omitted from the second branch I confess I should have found difficulty in discerning a foothold for the respondents' contention. If the intention was merely to reflect the procedural consequences of making all wagering contracts void I cannot but think that the natural way of effecting it would have been to add after the first branch some such sentence as—"and the "same shall not be enforceable in any court of law or equity." The words used—I leave the "alleged to be" out of account for the moment—do not appear to me to be apt for this purpose as, in strictness, the expression "no suit shall be brought or "maintained" confronts the would-be suitor with a higher obstacle than that which has to be met by one whose claim is defective only in that it is based on a transaction of no legal effect. On the other hand the wording of the second branch—I again assume the omission referred to—does seem apt and effectual if the intention of the legislature was that this limb of the section should not only cover the transactions previously made void but should reach beyond them so as to preclude resort to an obvious way round the earlier provision. What then is the effect of the words "alleged to be"? If, as the respondents contended, they mean "alleged by the plaintiff, "as a necessary part of his case to be" I think it must be admitted that they would lend force to what the respondents say as to the true construction of the section. In my opinion,

(1) 5 C. B. 271. (2) 2 Ex. D. 422.

however, this contention should be rejected. Whatever the true scope of the second branch may be, it must at least relate to suits brought on original wagering contracts declared void by the first branch, and I think it is quite impossible to accept the view that the legislature having thus armed the loser with an effective defence by that branch should proceed to make the second operate only if the winner himself chose to reveal the unenforceability of his claim. Were that the position the second would not even declare the consequences of the first, or, so far as I can see, fit in with any understandable design. For this reason, if for no other, I think the word "alleged" must embrace allegations by a defendant as well as by a plaintiff; and as the second branch, on this view, can hardly have been intended to depend on a bare plea, I also think it must follow that "alleged" is used as meaning "properly alleged" or "alleged and proved or admitted." If such be the significance of the words "alleged to be" I see nothing in them to detract from the meaning I would, as already indicated, attribute to the second branch were they omitted.

For these reasons I share the view expressed by Fletcher Moulton L.J., in *Hyams* v. *Stuart King* (1) on the interpretation of the second branch of s. 18 and am, accordingly, of opinion that the respondents' second submission also fails. In the result, if I am right in the conclusions stated, the decision in *Hyams* v. *Stuart King* (4) cannot be supported and ought to be overruled. I think, therefore, that the appeal should be allowed and the respondents' claim dismissed.

LORD RADCLIFFE. My Lords, I think that this appeal ought not to succeed. It succeeds if s. 18 of the Gaming Act, 1845, renders the respondents' action unmaintainable: it fails if that section, properly understood, has no application to the promise which the respondents' action seeks to enforce. The first thing to do is to see what the section provides. It falls, as I read it, into three parts. The first contains a declaration of substantive law to the effect that contracts by way of gaming or wagering are to be null and void. The second relates to procedural or adjectival law and enacts that "no "suit shall be brought or maintained in any court of law or "equity for recovering any sum of money or valuable thing "alleged to be won upon any wager, or which shall have been

(1) [1908] 2 K. B. 696.

"deposited in the hands of any person to abide the event on "which any wager shall have been made . . . ." The third part provides that "this enactment" is not to be deemed to apply to certain subscriptions or contributions or agreements therefor, the precise definition of which is not relevant.

It is indeed possible that the second part of this section ought to be construed so as to render unenforceable at law a contract to pay a sum of money which is not itself a wagering contract: but I confess that I should myself expect to find some compulsive indication that the legislature did so intend before I adopted this construction. Certainly I should approach a section so framed with the expectation that the second part did not go beyond the first and that it did not make a further contribution to the substantive law of contract by invalidating not merely contracts of gaming or wagering but other sorts of contract as well. I have not been able to find in the section any such compulsive indication as would lead me to abandon this expectation. Indeed such indications as there are, slight in themselves, tend to support my original view as to the range of the section. The second, or procedural, part is introduced by the word "and"; the words "alleged "to be won" are used to describe the sum of money of which recovery by legal action is forbidden; the proviso refers to what has gone before as "this enactment." It may be true that, if the view that I have suggested is right, the first part of the section would have sufficed to procure the failure of actions to enforce gaming or wagering contracts and that the second part would accordingly be tautologous, in the sense that it was unnecessary. I hesitate to accept even the basis of the argument. The second part, being lex fori, might well apply to relieve our courts of the duty of adjudicating on foreign wagering contracts which by the ordinary rules of private international law would escape invalidation by the first part.

But, if the second part is tautologous, be it so. Such instances of legislative abundance are not unknown. In fact, s. 1 of the Gaming Act, 1892, which ends with the words "and "no action shall be brought or maintained to recover any "such sum of money" contains what must be on any view just such a tautology. In this s. 18 the procedural consequence is not expressed so simply. But that is because the makers of the section were trying by one composite phrase to disable both the winner's action to enforce his contract against the

H. L. (E.)

1949

HILL
v.
WILLIAM
HILL
(PARK
LANE)
LD.

Lord Radcliffe.

loser and the winner's action to get the stakes out of the stakeholder's hands. By their language they have raised doubts as to the legislative intention, although these doubts, I think, belong more to the twentieth century than to that century in which the Act was passed. This is not the first occasion on which the range and effect of the second part of the section have been discussed, and the nineteenth century judges were, I think, unanimous in holding that it added nothing of substance to the first.

I do not feel much weight in this argument for extending the operation of the second part of s. 18 of the Act of 1845 because it would otherwise be tautologous. That it did weigh with Fletcher Moulton L.J. in his dissenting judgment in *Hyams* v. *Stuart King* (1), is plain. I prefer the construction of the section which was adopted by Rolfe, Alderson and Parke BB. in *Moon* v. *Durden* (2) by Maule J. in *Varney* v. *Hickman* (3) and by Lord Cairns and Bramwell J. in *Diggle* v. *Higgs* (4). The words of Lord Cairns appear to me accurately to state the effect of the section (5): "The section amounts to this: "all contracts by way of gaming and wagering are null and "void; and then, dealing with those contracts, it says that "no action shall be brought with respect to them: that is to "say, all gaming contracts are void, and the winner of the "game or wager shall not maintain a suit against his antagonist "or the stakeholder." We were rightly reminded by counsel for the appellant that each of these observations was made in a case which dealt directly with wagering contracts and in which therefore the first part of the section itself avoided the contract. But the observations are general observations on the construction of the section: and, apart from that, the decisions themselves are significant in showing that a merely literal reading of the section has been rejected by the courts when the respective rights of depositor and stakeholder have been in issue.

It remains to apply s. 18 to the facts of this appeal. They are not in dispute. In any common parlance Mr. Hill is being sued for payment of his betting debts, and in this, as in other cases on similar facts, I should expect to find the parties describing the promise which here is contained in Mr. Hill's letters of August 15 and 20, 1946, as a promise to pay the bets.

(1) [1908] 2 K. B. 696, 713.
(2) 2 Ex. 22.
(3) 5 C. B. 271.
(4) 2 Ex. D. 422.
(5) Ibid. 427.

But I do not think that common parlance must necessarily determine the parties' legal rights, since I think that the procedural part of s. 18 was directed to causes of action, not to common parlance. A bet is a transaction, not a piece of property. Money won on a betting transaction has no existence until paid: nothing exists except the loser's promise to pay what he has lost, a promise which the statute has made unenforceable at law. Such was Mr. Hill's promise to pay the respondents 3,835*l.* 12*s.* 6*d.* as the promise stood in July, 1946. When the committee of Tattersalls had dealt with the parties on July 22, 1946, Mr. Hill had an obligation to pay 635*l.* 12*s.* 6*d.* within fourteen days and 3,000*l.* by monthly instalments of 100*l.* (I omit reference to the 200*l.* lost on bets on dog racing, which the committee did not deal with.) The committee's order was, of course, no more enforceable at law than the betting promise, but its obligations were evidently regarded by the parties as superseding that promise. Mr. Hill's honour as a racing or betting man would have been intact had his payments observed no more than the dates which the committee required of him. No doubt, they were ordering Mr. Hill to pay his bet or his betting debt: but, if we are to speak of unenforceable obligations as obligations at all, I think that an obligation to pay 3,635*l.* presently is, and is regarded in business as being, substantially a different thing from an obligation to pay 635*l.* within fourteen days and the balance of 3,000*l.*, without interest, by equal monthly instalments over the next two and a half years.

In the racing world there are sanctions other than those which a law court can impose. The bargain that was made in August was, it is conceded, not a wagering contract. Nor do the facts of the appeal, as I understand them, allow us to say that the consideration then given by the respondents was "colourable," fictitious or a device. That solution of the problem, which Fletcher Moulton L.J. favoured, is not open to us. The contract, then, was not anything other than a contract valid by English law, except so far as s. 18 has the effect of preventing an action being brought or maintained to recover the promised payment. The bargain consisted in Mr. Hill undertaking to make such payments as were prescribed by the Tattersalls' order, subject to deferment of the initial payment, on the respondents undertaking not to "enforce" the order according to its original terms. By refraining from taking this action, which was within their power, they afforded

Mr. Hill what was good consideration for his promise. It was certainly what he wanted at the time. Its value is not measurable, nor is it relevant. Indeed the appellant's argument, if I understand it, would be the same if the respondents, instead of refraining from reporting him, had taken some positive steps at his request such as finding a large sum of money to pay off a pressing creditor. According to our law of contract, what had happened when these promises were exchanged in August? I think that we ought to say that a new contract had been made: not that a wagering contract, hitherto void, had received the support of a new consideration.

When the respondents sue to enforce this promise which Mr. Hill made in August, 1946, they are not, as I see it, bringing or maintaining an action to recover a sum of money alleged to be won upon a wager within the meaning of s. 18. That is why I think that the appeal ought to fail. It is part of the history of the matter that 3,835*l.* 12*s.* 6*d.* was owing on betting transactions. But what the respondents seek to recover in this action is part of the sum of money promised to them for good consideration in August, 1946, and not the sum of money which they won from Mr. Hill upon their previous wagers with him. Only if the promised sums have continuing identity —whatever that may mean—could one be the same as the other. The respondents' cause of action is a new contract, in enforcing which it may be a natural but is not a relevant averment that the moneys promised represented previous betting debts. And if it is not essential to the recovery to allege that the sum was won on what was a wagering contract, I cannot think that it is in truth a sum of money "alleged" to be so won within the meaning of the section.

Appeal allowed.

Solicitors for appellant: *Collyer-Bristow & Co., for A. D. Capel, Loft & Son, Stourport-on-Severn.*

Solicitors for respondents: *Hardcastle Sanders & Co.*

END OF VOL. AND OF APPELLATE SERIES FOR 1949.

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In the First Series,
[1949] Ch.
In the Second Series,
[1949] 1 K. B. [1949] 2 K. B. [1949] P.
In the Third Series,
[1949] A. C.

INDEX

BASUTOLAND—*Criminal law—Charge of murder—Evidence of accomplices—Corroboration—Statutory requirements—English rule of practice—Construction of amended Act—Resort to original Act—Administrative officer sitting with judge—Pre-trial irregularity—Basutoland Criminal Procedure and Evidence Proclamation* (*No.* 59 *of* 1938) (*as amended by s.* 1 *of the Criminal Procedure and Evidence* (*Amendment*) *Proclamation* (*No.* 12 *of* 1944), *s.* 231—*Basutoland High Court Proclamation* (*No.* 57 *of* 1938) (*as amended by s.* 1 *of No.* 41 *of* 1942), *s.* 7.
TUMAHOLE BERENG *v.* THE KING **J. C. 253**

BRITISH GUIANA — *Criminal law — Charge of murder — Evidence — Tending to connect accused with another earlier death in similar circumstances not covered by the indictment — Admissibility — Principles applicable.*
NOOR MOHAMED *v.* THE KING **J. C. 182**

CANADA — *Ontario — Negligence — Petrol sold to child— Unaware of dangerous properties — Use for torch—Injury by burning— Normal mischievous propensities—Liability.*
YACHUK AND ANOTHER *v.* OLIVER BLAIS CO., LD. - - - **J. C. 386**

2. —— *Revenue — Income tax — Timber limits—Exhaustion allowance—Discretion of Minister—Income War Tax Act, R. S. C.* 1927, *c.* 97 (*as amended by s.* 10 *of c.* 34 *of S. C.* 1940), *s.* 5, *sub-s.* 1 (*a*)—*Construction.*
D. R. FRASER AND CO., LD. *v.* MINISTER OF NATIONAL REVENUE - - **J. C. 24**

3. —— *Saskatchewan — Crop failure relief legislation—Limitation of contractual obligations of mortgagors and purchasers of farm land —Constitutional validity—" Interest " legislation— Ultra vires—Farm Security Act,* 1944, *c.* 30 *of Statutes of Saskatchewan,* 1944 (*second session*) (*as amended by s.* 2 *of c.* 28 *of Statutes of Saskatchewan,* 1945), *s.* 6—*British North America Act,* 1867 (30 *&* 31 *Vict., c.* 3), *s.* 91, *sub-s.* 19 ; *s.* 92, *sub-s.* 13.
ATTORNEY-GENERAL FOR SASKATCHEWAN *v.* ATTORNEY-GENERAL FOR CANADA AND OTHERS AND ATTORNEY-GENERAL FOR ALBERTA AND ATTORNEY-GENERAL FOR QUEBEC - - - - **J. C. 110**

4. —— *Saskatchewan — Labour Relations Board—Not a court analogous to a " superior, " district or county court "—Trade Union Act,* 1944 (*St. Sask.* (*2nd sess.*), *c.* 69) (*as amended by* c. 108 *of* 1945, *c.* 98 *of* 1946 *and c.* 102 *of* 1947), *s.* 5 (*e*)—*Intra vires—British North America Act,* 1867 (30 *&* 31 *Vict., c.* 3), *s.* 96.
LABOUR RELATIONS BOARD OF SASKATCHEWAN *v.* JOHN EAST IRON WORKS, LD. **J. C. 134**

5. —— *Saskatchewan — Revenue — Income tax — Non-residential manufacturing company—Profits from sales business in Saskatchewan—Exclusion of proportion of profit attributable to manufacturing operations outside the province—Income Tax Act,* 1932, *St. Sask., c.* 9, *s.* 7, *sub-s.* 4 ; *s.* 21*a*—*Income Tax Act,* 1936, *St. Sask., c.* 15, *s.*23—*Regulations issued pursuant to s.* 7, *sub-s.* 4, *of Income Tax Act,* 1932, *reg.* 3.
INTERNATIONAL HARVESTER COMPANY OF CANADA, LIMITED *v.* PROVINCIAL TAX COMMISSION AND OTHERS - - **J. C. 36**

6. —— *Shipping — Collision — Harbour —Vessel, with curving course constantly changing under port helm, on starboard side of approaching vessel— Knowledge of situation not ascribable to approaching vessel—Not crossing vessels— Articles* 19 *and* 21 *of Regulations for Preventing Collisions at Sea inapplicable—Issues of navigation and seamanship.*
OIVIND LORENTZEN, AS DIRECTOR OF SHIPPING AND CURATOR OF THE ROYAL

CANADA—*continued.*

Norwegian Government *v.* The Alcoa Rambler (Alcoa Steamship Co., Inc., Owners) - - - - **J. C. 236**

CEYLON — *Defamation — Bribery commission — Report — Sessional paper — Publication in newspaper—Defamatory statement—Action for damages — Privilege — Serving public interest—Roman-Dutch law—Animus injuriandi negatived — Special Commission (Auxiliary Provisions) Ordinance, No.* 25 *of* 1942, *s.* 6, *sub-s.* 1—*Construction.*
Perera (M. G.) *v.* Peiris and Another **J. C. 1**

CHARITY—*Charitable gift—Religious purpose—Declaration of trust—Trust for Roman Catholic convent—Cloistered and contemplative community.*
Gilmour *v.* Coats - **H. L. (E.) 426**

COAL. *See* Company.

COMPANY—*Reduction of capital—Colliery company — Nationalization of industry — Shareholders' rights—Preference and ordinary shares—Companies Act,* 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 55, *sub-s.* 1—*Coal Industry Nationalisation Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 59), *s.* 25.
Prudential Assurance Co., Ld. *c.* Chatterley-Whitfield Collieries, Ld. **H. L. (E.) 512**

2. —— *Reduction of capital—Impending liquidation—Colliery company—Nationalization of industry—Shareholders' rights—Preference and ordinary shares—Companies Act,* 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 55, *sub-s.* 1—*Coal Industry Nationalisation Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 59), *s.* 25.
Scottish Insurance Corporation, Ld. *v.* Wilsons & Clyde Coal Co., Ld. **H. L. (Sc.) 462**

CONTRACT—*Sale of goods—Delivery order tendered by sellers—Payment by buyers—Property in goods never transferred—Contract destination—Diversion of ship by sellers—No consent by buyers—Total failure of consideration—Not c.i.f. contract.*
Comptoir D'Achat et de Vente du Boerenbond Belge S A *v.* Luis de Ridder Limitada (The Julia) **H. L. (E.) 293**

CRIMINAL LAW. *See* British Guiana.

2. —— *Corroboration* *See* Basutoland.

DEFAMATION. *See* Ceylon ; Seychelles.

EVIDENCE. *See* British Guiana.

FACTORY ACTS—*Maintenance—Hoists and lifts—Inexplicable failure of mechanism—Statutory duty—Factories Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 22, *sub-s.* 1, *s.* 152, *sub-s.* 1.
Galashiels Gas Co., Ld. *v.* O'Donnell or Millar - - - **H. L. (Sc.) 275**

GAMING AND WAGERING — *Betting — Debts incurred—Report to Tattersalls—Order for payment—Inability to comply—Offer of post-dated cheque—Bookmakers refraining from enforcing order—Independent consideration—Enforceability of agreement—Gaming Act,* 1845 (8 *&* 9 *Vict., c.* 109), *s.* 18.
Hill *v.* William Hill (Park Lane), Ld. **H. L. (E.) 530**

2. —— *Betting — Dog-racing track — Use of totalisator—Provision for bookmakers—"Space . . . . where they can conveniently "carry on bookmaking"—Action at suit of individual bookmaker—Betting and Lotteries Act* (24 *&* 25 *Geo.* 5, *c.* 58), *s.* 11, *sub-s.* 2 (*b*) ; *s.* 30, *sub-s.* 1.
Cutler *v.* Wandsworth Stadium, Ld. **H. L. (E.) 398**

HIGHWAY — *Pedestrian crossing places — Precedence of foot passengers over vehicular trffiac—Crossing place controlled by light signals—Duty of drivers of vehicles approaching crossing—Pedestrian Crossing Places (Traffic) Regulations,* 1941 (*St. R. & O.* 1941, *No.* 397) *reg.* 3.
London Passenger Transport Board *v.* Upson and Another - **H. L. (E.) 155**

HOUSING—*Local authority — Working class house—Letting for more than* 20*l. a year—Claim for possession under Small Tenements Recovery Act,* 1838 (1 *&* 2 *Vict., c.* 74), *s.* 1—*Warrant for possession—Magistrate's discretion—Housing Act,* 1934 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 51), *s.* 83, *sub-s.* 1 ; *s.* 156, *sub-ss.* 1, 2.
Shelley *v.* London County Council. Harcourt *v.* Same - **H. L. (E.) 56**

LOCAL GOVERNMENT. *See* Housing.

NEGLIGENCE—Children. *See* Canada.

PRACTICE—*Writ—Service out of jurisdiction—Action to recover cost of wreck removal—Crown and their agents co-defendants in respect of cargo liability—Foreign shipowner—"Proper party"—"Action properly brought"—R. S. C.* 1883, *Or.* 11, *r.* 1 (*g*) ; *r.* 4.
Tyne Improvement Commissioners *v.* Armement Anversois S/A (The Brabo) **H. L. (E.) 326**

REVENUE — *Estate duty — Sale of land — Irish settlement — Capital money — Investments in England—Death of first tenant for life—Claims for estate duty by authorities in*

REVENUE—*continued.*

England and Eire—Settled Land Act, 1882 (45 & 46 *Vict., c.* 38), *s.* 22, *sub-s.* 5—*Finance Act,* 1894 (57 & 58 *Vict., c.* 30), *ss.* 1, 2, *sub-s.* 2—*Irish Free State Constitution Act,* 1922 (*sess.* 2) (13 *Geo.* 5, *c.* 1), *s.* 1, *sch. I., art.* 73.
MIDLETON (EARL) *v.* COTTESLOE (BARON) AND OTHERS - - - **H. L. (E.) 418**

2. —— *Income tax — Allowance — Manufacture of country made cigarettes—Contractual right to pick and remove tendu leaves—Payment wholly and exclusively for purposes of business—Revenue expenditure—Deductible—Indian Income-tax Act* (*XI. of* 1922) (*as amended by the Indian Income-tax* (*Amendment*) *Act,* 1939), *s.* 10, *sub-s.* 2 (xii).
MOHANLAL HARGOVIND OF JUBBULPORE, MESSRS. *v.* COMMISSIONER OF INCOME TAX, CENTRAL PROVINCES AND BERAR, NAGPUR **J. C. 521**

3. —— *Income tax — Capital and income —Foreign company—Remittance to shareholders in United Kingdom—Dividend payable from capital profits—Whether income in recipient's hands—Income Tax Act,* 1918 (8 & 9 *Geo.* 5, *c.* 40), *sch. D., Case V.*
INLAND REVENUE COMMISSIONERS *v.* REID'S TRUSTEES - - - **H. L. (Sc.) 361**

ROAD TRAFFIC. *See* HIGHWAY.

SALE OF GOODS. *See* CONTRACT.

SEYCHELLES — *Legislative council — Alleged defamatory statement by member in council chamber—Immunity from action—Absolute privilege—Seychelles Penal Code* (*Ord. No.* 10 *of* 1904) *s.* 192, *sub-s.* 1 (*a*)—*Letters Patent of August* 31, 1903, *cl.* 8—*Colonial Laws Validity Act,* 1865 (28 & 29 *Vict., c.* 63), *ss.* 2, 5.
CHENARD AND CO. AND OTHERS *v.* JOACHIM ARISSOL - - - - **J. C. 127**

SHIPPING — *Bill of lading — Unseaworthiness—Delay—Nominated discharging port not reached—Outbreak of war—Discharge at another port under Admiralty orders—Cost of forwarding to nominated discharging port—Damages for breach of bill of lading contract—Remoteness of damage.*
MONARCH STEAMSHIP CO., LD. *v.* KARLSHAMNS OLJEFABRIKER (A/B) **H. L. (Sc.) 196**

2. —— *Time charter-partly — Hire — Non-payment—Right of withdrawal.*
TANKEXPRESS A/S *v.* COMPAGNIE FINANCIÈRE BELGE DES PETROLES S.A. (THE PETROFINA) - - - **H. L. (E.) 76**

3. —— *See* CANADA.

STATUTORY DUTY — Breach of. *See* FACTORY ACTS.